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COMMENT

INSURANCE COVERAGE FOR HAZARDOUS WASTE CLEANUP: THE COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY DEFINED

Cleanup of hazardous waste sites has become one of the leading problems of the decade.¹ Since the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)² in 1980, and the Resource Conservation and Recovery Act (RCRA)³ in 1976, courts have found private parties liable for past hazardous waste activities of site owners, operators, waste generators, and transporters.⁴ Under CERCLA, the Federal Government can order responsible parties to clean up hazardous waste sites⁵ or can clean up the contamination itself⁶ and later sue the responsible

1. See Superfund Amendments and Reauthorization Act of 1986, H.R. REP. NO. 253(I), 99th Cong., 2d Sess. 54-55, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835-37.

2. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9657 (1982 & Supp. V 1987)), *reauthorized and amended in part by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9657 (Supp. V 1987)).

3. Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6991 (1982 & Supp. V 1987)). The Resource Conservation and Recovery Act (RCRA) regulates the waste management practices of generators and transporters of hazardous waste as well as owners and operators of hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. §§ 6922-6924. It also provides a remedy for combating environmental contamination. Under RCRA, the Federal government may institute an action to restrain any person contributing to the creation or maintenance of an imminent and substantial endangerment to health and the environment. *Id.* § 6928. This Comment focuses specifically on the question of insurance coverage for environmental liabilities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and does not address RCRA liabilities and insurance related issues.

4. See, e.g., *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986) (corporate officer held liable because he personally arranged for the transportation and disposal of hazardous wastes), *cert. denied*, 108 S. Ct. 146 (1987); *New York v. North Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) (officer and stockholder held liable for cleanup costs as an "owner or operator").

5. 42 U.S.C. § 9606(a).

6. *Id.* § 9604.

parties for recovery of the cleanup costs.⁷ The liabilities imposed pursuant to CERCLA have created an enormous financial burden for the responsible parties.⁸ To defray the costs incurred in the cleanup, these parties have sought reimbursement from their liability insurance carriers.

Disputes have arisen over insurance coverage for the costs of hazardous waste cleanup. The general provision of the standard comprehensive general liability (CGL) insurance policy provides that the insurer "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . property damage"⁹ Disclaiming coverage for cleanup costs, insurance companies have typically argued that government actions pursuant to CERCLA seek equitable remedies which insurers are not obligated to pay as damages.¹⁰ Even assuming that damages include cleanup costs, insurers have argued that cleanup costs are not the measure of property damage and therefore are not covered under the CGL policy.¹¹ For there to be coverage, according to the insurers, the government actions must seek damages and they must allege property damage.¹² Those insured, by contrast, take the position that CGL policies provide coverage for "all sums" the insured may be held liable to pay as a result of property damage, including cleanup costs.¹³

Court decisions are by no means uniform in the resolution of this dispute.¹⁴ The United States Courts of Appeals for the Fourth and Eighth Circuits have determined that the term "damages" limits the coverage available to the insured¹⁵ and that cleanup costs constitute equitable relief that is not within the damages limitation.¹⁶ Thus, those courts hold that where the underlying government actions do not claim damages, but seek to impose

7. *Id.* § 9607(a)(4)(A).

8. See generally Chesler, Rodburg, & Smith, *Patterns of Judicial Interpretation of Insurance Coverage for Hazardous Waste Site Liability*, 18 RUTGERS L.J. 9, 11-13 (1986) (discussing the magnitude of costs incurred in the cleanup of hazardous waste sites).

9. See *infra* note 36 and accompanying text.

10. See, e.g., *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chem. Co. (NEPACCO)*, 842 F.2d 977, 983 (8th Cir.) (en banc), *cert. denied*, 109 S. Ct. 66 (1988).

11. *Id.*

12. *Id.*

13. See, e.g., *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 588, 336 N.W.2d 838, 842 (1983).

14. See *infra* notes 69, 101 and accompanying text.

15. See *NEPACCO*, 842 F.2d 977, 985-86 (8th Cir.), *cert. denied*, 109 S. Ct. 66 (1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

16. See *Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1988); *NEPACCO*, 842 F.2d at 987; *Armco*, 822 F.2d at 1354. *Accord* *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955).

equitable remedies, there is no coverage under the policy.¹⁷ Other federal and state courts have concluded, to the contrary, that cleanup costs are damages within the meaning of the CGL policies.¹⁸ Typically, these courts have held that cleanup costs are "sums" which the insured is legally obligated to pay because of property damage.¹⁹ The different views espoused by the courts hinge on the interpretation of the relevant clauses in the CGL policies.²⁰ Perhaps because courts have treated the issue of coverage for government mandated cleanup costs as one governed by state law, the United States Supreme Court has yet to grant a petition for writ of certiorari.²¹

This Comment analyzes the division of authority regarding coverage for environmental liabilities. First, this Comment examines the question of whether response costs under CERCLA, including cleanup costs, constitute equitable relief or legal damages. It then addresses the issue of whether governmentally imposed cleanup costs are covered damages because of property damage. The Comment concludes that the interpretation of the United States Courts of Appeals for the Fourth and Eighth Circuits, finding no coverage for cleanup costs, accurately states the obligations of the insurer and the insured under the standard comprehensive general liability insurance policy.

I. ORIGIN OF LIABILITY FOR HAZARDOUS WASTE CLEANUP

A. CERCLA

The statutory scheme of CERCLA grants broad authority to the Federal Government to combat contamination of the environment and to protect the

17. *NEPACCO*, 842 F.2d at 987; *Armco*, 822 F.2d at 1354.

18. See *infra* note 101 and accompanying text. This Comment was in print when the United States Court of Appeals for the Second Circuit issued its decision in *Avondale Indus., Inc. v. Travelers Indemn. Co.*, No. 89-7035, slip op. at 7 (2d Cir. Oct. 18, 1989). Therefore, this Comment does not consider the Second Circuit's decision. However, the *Avondale* decision does not alter the conclusion reached by the author.

19. See, e.g., *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1168 (W.D. Mich.), *vacated on other grounds*, 683 F. Supp. at 1177 (W.D. Mich. 1988); *Consolidated Rail Corp. v. Certain Underwriters at Lloyds*, No. 84-2609, slip op. at 12 (E.D. Pa. June 3, 1986), *aff'd*, 853 F.2d 917 (3d Cir. 1988).

20. See, e.g., *Intel Corp. v. Hartford Accident & Indem. Co.*, 692 F. Supp. 1171, 1189 (N.D. Cal. 1988) (finding that the law of the state that the court applied is dispositive and that the application of each state's law may provide a different answer to the question of coverage for cleanup costs).

21. See, e.g., *NEPACCO*, 842 F.2d 977; *Armco*, 822 F.2d 1348. See also *Lac D'Amiante du Quebec v. American Home Assurance Co.*, 613 F. Supp. 1549, 1551 n.3 (D.N.J. 1985) (questioning whether Supreme Court review is likely given its policy against rulings based on state law).

health and welfare of the public.²² CERCLA imposes liability on responsible parties; namely, owners and operators of hazardous waste facilities, waste generators, disposers, and transporters.²³ Under CERCLA, the Federal Government may seek an injunction to compel responsible parties to clean up hazardous waste sites that constitute an "imminent and substantial endangerment" to health and the environment.²⁴ Furthermore, the statute authorizes the government to institute cleanup efforts on its own²⁵ and to subsequently seek reimbursement for expenditures incurred from responsible parties.²⁶ CERCLA, moreover, permits recovery of cleanup costs expended

22. See Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986, 986-87 (1986) (discussing economic and legal considerations for imposing liability on parent corporations of subsidiaries that contribute to contamination of the environment); Note, *Developments in the Law: Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1465-66, 1517-43 (1986) (discussing the broad standards of liability under CERCLA) [hereinafter *Toxic Waste Developments*].

CERCLA has two goals: to clean up the environment if a hazardous substance is released, or threatens to be released, into the environment; and to hold responsible parties liable for the costs incurred in cleaning up the environment. See HOUSE COMM. ON THE JUDICIARY SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, H.R. REP. NO. 253 (III), 99th Cong., 1st Sess. 15, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 3038; see also S. REP. NO. 848, 96th Cong., 2d Sess. 13 (1980) (Congress promulgated statute in order to "assur[e] that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business."); Habicht, *Responses to Justice Antonin Scalia*, 24 HOUS. L. REV. 111, 114 (1987) (goals of CERCLA require industry to have "substantial impact on the cleanup process" and assist in the "internalization of the costs of hazardous waste disposal").

23. 42 U.S.C. § 9607 (1982 & Supp. V 1987).

24. *Id.* § 9606(a). Section 9606(a) provides, in pertinent part:

[W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat

Id.

25. *Id.* § 9604(a)(1). This section provides that when a hazardous substance or pollutant has been released, or where there is a substantial threat of such a release into the environment, the government is authorized to remove or arrange for the removal of the substance or contamination. *Id.* Money for the cleanup comes from the fund established under CERCLA. See *id.* § 9611. Pursuant to section 9607, the government can initiate an action seeking reimbursement of the response costs for the purpose of replenishing this fund. See *infra* note 26 and accompanying text.

26. 42 U.S.C. § 9607(a)(4)(A). Section 9607(a) identifies those persons who are liable for response costs the Federal Government incurred pursuant to sections 9604(a)(1) and 9606. Section 9607(a)(4) creates three causes of action:

[A]ny person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a

by private individuals.²⁷ The government can also institute an action for damages for injury to natural resources.²⁸

release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

Id.

27. *Id.* § 9607(a)(4)(B). *See supra* note 26.

28. 42 U.S.C. § 9607(a)(4)(C). *See supra* note 26. CERCLA distinguishes between an action seeking response costs pursuant to subsection 9607(a)(4)(A) and an action requesting a recovery of damages pursuant to subsection 9607(a)(4)(C). *See supra* note 26. The Department of Interior acknowledged this distinction in comments concerning the regulation on the assessment of damages under subsection 9607(a)(4)(C):

Natural resource damage assessments are not identical to response or remedial actions (cleanup) addressed by the larger statutory scheme of CERCLA. . . . Assessments are not intended to replace response actions, which have as their primary purpose the protection of human health, but to supplement them, by providing a process for determining proper compensation to the public for injury to natural resources.

51 Fed. Reg. 27674 (1986) (comments accompanying Natural Resource Damage Assessments Final Rule). To calculate damages under subsection 9607(a)(4)(C), the Department of the Interior developed a theory of natural resource damages based on the common law principle of damages, namely "that money can be used to provide substitutionary relief." *Id.* at 27680. "A fundamental principle of the theory . . . is that natural resource damages are compensatory, not punitive." *Id.* Money awarded under this principle represents a measure of "the value of the thing that is lost." *Id.* The regulations that were subsequently codified defined damages as the amount of money sought by the Federal or State government "as compensation for injury, destruction, or loss of natural resources" as set forth in section 9707(a) of CERCLA. Natural Resource Damage Assessments, 43 C.F.R. § 11.14(f) (1988).

The legislative history of CERCLA further supports the view that response or cleanup costs recovered pursuant to subsection 9607(a)(4)(A) are not the equivalent of damages recoverable pursuant to subsection 9607(a)(4)(C). In *Idaho v. Bunker Hill*, 635 F. Supp. 665 (D. Idaho 1986), the court, considering a damages claim for injury to natural resources, noted that the statute did not provide specific guidelines for the calculation of such damages. *Id.* at 675. The court consequently relied upon legislative history:

[Senator Simpson, during a Senate debate,] suggested that traditional tort rules for calculating damages should be observed as appropriate. He commented by way of example that the law awards the difference in value before and after the injury in some cases and where the injury can be restored to its original condition for less than the difference in value, the cost of restoration is the appropriate measure. Damages to the natural resources may be calculated on a value basis and on a cost-of-restoration basis. The calculation which provides the least recovery in terms of dollars is the appropriate measure of damages.

Id. at 676 (citation omitted) (citing 126 CONG. REC. 30,986 (1980) (statement of Sen. Simpson)). *See also* Toxic Waste Developments, *supra* note 22, at 1567-72 (discussing the measure of damages to natural resources). The court, relying on the statement of Senator Simpson, recognized that it may calculate natural resource damages on a value basis or on a cost-recov-

The potential impact of CERCLA liability on parties responsible for creating an imminent and substantial endangerment to the environment is enormous. CERCLA imposes strict liability on all parties responsible for improperly handling or disposing hazardous substances.²⁹ CERCLA does not limit how far back the Federal Government can look to find acts that have caused or contributed to hazardous waste contamination.³⁰ In addition, CERCLA holds site owners, operators, waste generators, disposers, and transporters jointly and severally liable for cleanup costs where the injury is indivisible.³¹ The statute effectively holds all responsible parties liable for the costs of cleaning up a hazardous waste site, even as to contamination that occurred prior to the enactment of the statute.³²

B. The Standard Comprehensive General Liability Insurance Policy

When the government institutes an action pursuant to CERCLA, requesting the insured to clean up the contamination or seeking recovery of costs the government has incurred as a result of cleaning up the contamination itself, the insured must respond to the allegations of the government's complaint by either admitting liability, and therefore responding to the demand for cleanup, or by raising defenses to those allegations. Because of the high costs involved in responding to environmental contamination at hazardous

ery basis. 635 F. Supp. at 676. *But see* Ohio v. United States Dep't of Interior, 880 F.2d 432, 438 (D.C. Cir. 1989) (holding the Department of Interior's rule, which is based on a comparison of the loss of use of the damaged resource and the cost of restoration of the damaged resource, contrary to legislative intent and therefore invalid).

29. 42 U.S.C. § 9607(a). *See generally* Kaplan, Balloun, & Stigall, *Defense Strategies and Insurance Coverage Issues in a "Superfund" Case*, 53 INS. COUNS. J. 554, 556 (1981) (discussing standard of liability applied to responsible parties).

30. *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 742-44 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); New York v. Shore Realty Corp., 759 F.2d 1032, 1052-53 (2d Cir. 1985).

31. *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983). The legislative history of CERCLA explicitly states that the courts are responsible for determining the standard of liability under CERCLA. The term "joint and several liability" was deleted from the statute in order to allow courts to establish the scope of liability on a case-by-case basis in accordance with common law principles. *See* 126 CONG. REC. 31,966 (1980) (statement by Rep. Florio); 126 CONG. REC. 30,935 (1980) (statement by Sen. Stafford). In *Chem-Dyne*, the court, after reviewing the legislative history of CERCLA, determined that joint and several liability was appropriate in CERCLA cases when two or more persons cause a single and indivisible harm. 572 F. Supp. at 810. Other courts have similarly adopted the joint and several liability standard. *See, e.g.*, *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d at 743-44; *Shore Realty*, 759 F.2d at 1052-53.

32. *See, e.g.*, *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d at 737 (finding that Congress intended CERCLA to apply retroactively); United States v. Conservation Chem. Co., 619 F. Supp. 162, 220 (W.D. Mo. 1985) (because CERCLA attaches a new legal significance to past hazardous waste activities, it is considered retroactive law).

waste sites, the responsible parties have approached their liability insurance carriers for legal defense and indemnification.³³ The insureds contend that the CGL policy they purchased provides the broadest coverage available, which includes representation against government actions under CERCLA.³⁴ The insurers, conversely, claim that the parties did not contemplate coverage for cleanup costs when the policies were issued and therefore such costs were not covered.³⁵ The disputes that have arisen between the insured and the insurer generally stem from a disagreement about the interpretation of certain terms under the CGL policy.

Under the standard CGL policy, the insurer is obligated to "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as *damages because of . . . property damage . . .*"³⁶ The policy defines property damage as "physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof . . ."³⁷ The policy, however, does not define the term damages, and disagreements as to the interpretation of the terms have led to litigation.³⁸

Courts interpreting the terms of standard CGL policies have reached inconsistent results.³⁹ General principles of insurance law require that the

33. The standard CGL policy obligates the insurer to defend any suit against the insured seeking damages and to pay all sums as damages because of property damage. Annotation, *Insurer's Duty to Defend Injunctive Proceedings*, 53 A.L.R.2d 1132 (1957); see *infra* note 36 and accompanying text. This Comment does not address the issue of the insurer's obligation to defend government actions. It focuses solely on the insurer's obligation to indemnify the insured for sums incurred in connection with government actions.

34. See, e.g., *FMC Corp. v. Liberty Mut. Ins. Co.*, No. 643058, slip op. at 7 (Cal. Super. Ct. Santa Clara County Jan. 3, 1989) (insured asserts a broad definition of the term damages to support a finding of coverage). See also *Diamond Shamrock Chem. Co. v. Aetna Casualty & Sur. Co.*, No. C-3939-84, op. at 19-20 (N.J. Super. Ct. Ch. Div. Dec. 11, 1987) (bench ruling) (CGL policies contained broad language), *rev'd on other grounds*, 231 N.J. Super. 1, 554 A.2d 1342 (App. Div. 1989); Note, *The Applicability of General Liability Insurance to Hazardous Waste Disposal*, 57 S. CAL. L. REV. 745, 757 (1984) ("The very title 'Comprehensive General Liability Insurance' suggests the expectation of maximum coverage.").

35. See *Toxic Waste Developments*, *supra* note 22, at 1575-76 (discussing insurance crisis that resulted from the shift of liability from parties responsible for hazardous waste contamination to the liability insurance companies).

36. *Continental Ins. Cos. v. NEPACCO*, 842 F.2d 977, 979 (8th Cir.) (emphasis added), *cert. denied*, 109 S. Ct. 66 (1988). See also Soderstrom, *The Role of Insurance in Environmental Litigation*, 11 FORUM 762, 764 (1976) (discussing the 1966 standard CGL policy).

37. *NEPACCO*, 842 F.2d at 979. See also 7A J. APPLEMAN, *INSURANCE LAW & PRACTICE* § 4508.02 n.1 (1979). The standard CGL policy excludes liability for property damage to "property owned or occupied by or rented to the insured." *Id.* § 4493.03 n.1.

38. *Toxic Waste Developments*, *supra* note 22, at 1578-79 (discussing litigation concerning interpretation of the CGL insurance policy).

39. Compare *NEPACCO*, 842 F.2d at 985 (finding that the plain meaning of damages did not constitute equitable monetary relief but rather legal damages) and *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987) (adopting a narrow, technical definition of

terms of the policy dictate the obligations of the insurer and insured.⁴⁰ If the language of the policy has a single, plain meaning, then that language will determine the obligations of the parties.⁴¹ Clear and unambiguous terms in the contract are construed according to their plain meaning, that is, what an ordinary, reasonable lay person would understand the meaning to be.⁴² Where, however, the terms of the policy are unclear or ambiguous, the general rule requires courts to construe the policy language against the insurer.⁴³ Differing interpretations of the meaning of the policy terms have thus resulted in a split in authority on the issue of coverage for cleanup costs.

damages), *cert. denied*, 108 S. Ct. 703 (1988) and *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955) (according the term "damages" a legal, technical meaning in law) with *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365 (D. Del. 1987) (rejecting the legal, technical definition of the word damages and giving the term an ordinary, usual meaning) and *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 589, 336 N.W.2d 838, 843 (1983) (finding the legal, technical interpretation of damages too narrow).

40. 2 G. COUCH, *COUCH ON INSURANCE* 2D § 15:10 (rev. ed. 1984); see also B. OSTRAGER & T. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 1.01 (1988).

41. See sources cited *supra* note 40.

42. G. COUCH, *supra* note 40, §§ 15:17-:18.

43. *Id.* § 15:74; B. OSTRAGER & T. NEWMAN, *supra* note 40, §§ 1.01-.02. This rule of construction is frequently referred to as the contra-proferentem doctrine. Some courts apply a variation of this doctrine based on the reasonable expectations of the insured. Under the reasonable expectations doctrine, in determining the meaning of a policy term, courts consider what a reasonable person in the position of the insured would have understood the word to mean. B. OSTRAGER & T. NEWMAN, *supra* note 40, § 1.03(b)(2). For an indication of the courts that apply the reasonable expectations doctrine when interpreting the provision "damages because of property damage," see *infra* note 140 and accompanying text.

However, even when the terms of the policy are ambiguous, courts should not automatically construe the language against the insured. The contra-proferentem and reasonable expectations doctrines, developed by the courts to eliminate the unequal bargaining power of the insurer as compared to the individual person, should not apply when the insured is a sophisticated company or when the insurance policies are negotiated on behalf of the insured by sophisticated brokers, risk managers, or counsel. See B. OSTRAGER & T. NEWMAN, *supra* note 40, § 1.03(c). Thus, when the business insured possesses bargaining power equivalent to that of the insurer, the rules of construction favoring the insured should not apply. See, e.g., *Halpern v. Lexington Ins. Co.*, 715 F.2d 191, 193 (5th Cir. 1983) (contra-insurer rule does not apply when it produces an unreasonable result); *Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1180 (3d Cir. 1979) (because parties possessed relatively equal bargaining power, court refused to apply the contra-insurer rule); *Insurance Co. of N. Am. v. John J. Bordlee Contractors*, 543 F. Supp. 597, 602 (E.D. La. 1982) (contra-insurer rule is only appropriate when the insured is "an innocent and naive party unfamiliar with the insurance field"); *Shell Oil Co. v. Accident & Casualty Ins. Co. of Winterthur*, No. 278953, slip op. at 17 (Cal. Super. Ct. San Mateo County July 13, 1988) (tentative decision) (contra-insurer rules do not apply where insured is "large sophisticated corporation of substantial worth guided in its insurance negotiations by an able staff" which was assisted by renowned brokers and which had equal bargaining power).

II. INSURANCE COVERAGE FOR CLEANUP COSTS: INTERPRETATION OF CGL POLICY TERMS

In determining whether costs incurred in cleaning up contaminated sites are sums that the insured is legally obligated to pay "as damages . . . because of property damage,"⁴⁴ courts first consider whether cleanup costs constitute damages within the meaning of the insurance policy.⁴⁵ If the relief sought by the government pursuant to CERCLA and RCRA constitutes damages, courts then reach the question of whether the sums the insured seeks to recover are the measure of property damage.⁴⁶ Only if courts answer both of these questions affirmatively is there coverage for cleanup costs under the standard CGL policy.⁴⁷

A. Significance of the Nature of the Relief Sought: Equitable Relief or Legal Damages

Courts disagree on whether governmentally imposed cleanup costs constitute damages, which is a requirement for coverage.⁴⁸ Some courts have foreclosed coverage, holding that the government actions under CERCLA, which seek reimbursement for cleanup costs or which require that the responsible parties abate and clean up the contaminated areas, are actions for equitable relief and not for damages.⁴⁹ Other courts, adopting a broader interpretation of damages, have held that cleanup costs are essentially compensatory damages recoverable under a CGL policy.⁵⁰

44. *Continental Ins. Co. v. NEPACCO*, 842 F. 2d 977, 979 (8th Cir.), *cert. denied*, 109 S. Ct. 66 (1988).

45. *See, e.g., id.*; *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

46. *See, e.g., Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986).

47. *See NEPACCO*, 842 F.2d at 983.

48. *See infra* notes 69, 101 and accompanying text.

49. *See, e.g., Cincinnati Ins. Co. v. Milliken & Co.*, 857 F.2d 979, 981 (4th Cir. 1988); *NEPACCO*, 842 F.2d at 987; *Armco*, 822 F.2d at 1354. Whether the government cleaned up the contamination itself and later sought reimbursement of the money it expended, or demanded that the insured clean up the contamination, courts have held that both remedies are equitable in nature. *NEPACCO*, 842 F.2d at 987; *Armco*, 822 F.2d at 1353-54.

50. *See, e.g., United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1168 (W.D. Mich.), *vacated on other grounds*, 683 F. Supp. at 1177 (W.D. Mich. 1988); *Solvents Recovery Serv. of New England, Inc. v. Midland Ins. Co.*, No. L-25610-83, *op. at* 23 (N.J. Super. Ct. Law Div. Nov. 17, 1986), *rev'd on other grounds*, 218 N.J. Super. 49, 526 A.2d 1112 (App. Div. 1987); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 93, 323 S.E.2d 726, 735 (1984), *rev'd on other grounds*, 315 N.C. 688, 340 S.E.2d 374 (1986).

1. *No Coverage for Cleanup Costs: The Limited Definition of Damages*

One of the first cases to distinguish between legal damages and equitable relief in the insurance context was *Aetna Casualty and Surety Co. v. Hanna*.⁵¹ In *Hanna*, a case decided prior to the enactment of CERCLA, the insureds sought recovery of costs they expended when complying with a mandatory injunction.⁵² The insurer refused to defend the mandatory injunction suit, claiming that it had no obligation to provide a defense because the suit did not require the insured to pay damages.⁵³

The United States Court of Appeals for the Fifth Circuit agreed with the insurers and held that the insurance policy did not cover expenses incurred as a result of complying with a mandatory injunction.⁵⁴ To resolve the question of the insurer's duty to defend, the Fifth Circuit looked to the policy language to determine whether it covered mandatory injunctive orders.⁵⁵ The court, finding the term "damages" to be plain and unambiguous, determined that the obligation of the insurer was to pay damages; the insurer was not obligated to pay the cost of complying with a mandatory injunction.⁵⁶ The Fifth Circuit explained that the policy covered payments to third persons when those persons had a legal claim for damages against the insured because of property damage.⁵⁷ The obligation of the insurer "to pay" was limited to damages, a term which, according to the court, had "an accepted technical meaning in law."⁵⁸ Had the adjacent property owners brought an action for trespass to land against the Hannas, thereby seeking damages, the insurer would have been obligated to pay as well as to defend the suit.⁵⁹ However, because the suit against the insured sought only injunctive relief, the court concluded that there was no duty to defend the mandatory injunction suit or to indemnify the insureds for sums incurred in connection with the government action.⁶⁰

51. 224 F.2d 499 (5th Cir. 1955).

52. *Id.* at 500-01.

53. *Id.* at 501.

54. *Id.* at 503-04.

55. *Id.* at 503.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 504 (citing with approval *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 131, 106 A.2d 196, 198 (1954) (costs of complying with an order requiring the removal of an obstruction are not sums that an insurer is legally obligated to pay as damages, but are sums designed to prevent reoccurrence of injury)); *see also* *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435, 440 (D. Md. 1977) (the relief sought in a Securities and Exchange Commission action was equitable in nature and was not damages within the meaning of the

More recently, the United States Court of Appeals for the Fourth Circuit similarly accorded the term "damages" a legal, technical meaning. In *Maryland Casualty Co. v. Armco, Inc.*,⁶¹ the insurer sought a declaratory judgment that it was not obligated to defend a CERCLA suit brought against its insured or to indemnify the insured for sums incurred in connection with that suit.⁶² The Fourth Circuit began its discussion of the meaning of damages by acknowledging that, under Maryland law, the court must construe the terms of an insurance policy according to their ordinary meaning.⁶³ The court, however, adopted the approach in *Hanna*, which subscribed to a legal, technical definition of the term "damages," precluding coverage for claims for equitable relief.⁶⁴ The court noted that the language "to pay as damages" limited an insurer's obligation to the insured.⁶⁵ If the court construed the provision broadly, then the term "damages" would become mere surplusage; the insurer would be required to pay all sums the insured was obligated to pay because of property damage.⁶⁶ After determining that damages had a specific meaning that limited the insured's obligation under the policy, the court addressed the question whether the government's claim for relief was a claim for damages.⁶⁷ Finding that an action for recovery of cleanup

policy); *Ladd Constr. Co. v. Insurance Co. of N. Am.*, 73 Ill. App. 3d 43, 48, 391 N.E.2d 568, 572 (1979) (following *Hanna* and *Desrochers*).

61. 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

62. *Id.* at 1350. The government's complaint sought injunctive relief against Armco as well as reimbursement for costs of removal or remedial action pursuant to subsection 9607(a)(4)(A) of CERCLA. *Id.* at 1350-51.

63. *Id.* at 1352 (citing *Pacific Indem. Co. v. Interstate Fire & Casualty Co.*, 302 Md. 383, 388, 488 A.2d 486, 488 (1985)).

64. *Id.* (citing *Hanna*, 224 F.2d 499 and *Desrochers*, 99 N.H. 129, 106 A.2d 196). The court observed that Maryland law had similarly adopted a technical definition of damages. *Id.* See *Haines*, 428 F. Supp. at 441 (no coverage for suit for injunctive relief, restitution, and disgorgement).

65. *Armco*, 822 F.2d at 1352.

66. *Id.*

67. *Id.*

costs constituted an equitable form of relief,⁶⁸ the Fourth Circuit held that cleanup costs were not covered under the terms of the insurance policy.⁶⁹

68. *Id.* The Court of Appeals for the Fourth Circuit focused on the form or type of relief sought by the government in the CERCLA action. *Id.* The court noted that even if the amount of damages awarded to the government under CERCLA subsection 9607(a)(4)(C) equaled the amount of money recovered by the government for costs incurred in investigating and cleaning up environmental contamination pursuant to subsection 9607(a)(4)(A), the obligation of the insurer to pay was limited to damages. *Id.* at 1352-53.

Numerous courts have recognized the equitable nature of the cost recovery remedies provided under CERCLA. *See, e.g.,* United States v. Northeastern Pharmaceutical Chem. Co., 810 F.2d 726, 749 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 146 (1987); United States v. Dickerson, 640 F. Supp. 448, 453 (D. Md. 1986); United States v. Ward, 618 F. Supp. 884, 913 (E.D.N.C. 1985); United States v. Mottolo, 605 F. Supp. 898, 913 (D.N.H. 1985); Wehner v. Syntex Corp., 618 F. Supp. 37, 37 (E.D. Mo. 1984); United States v. Argent Corp., 21 Env't Rep. Cas. (BNA) 1353, 1354 (D.N.M. 1983).

69. *Armco*, 822 F.2d at 1352. Other courts have echoed the logic of *Armco*. *See* Travelers Indem. Co. v. Allied-Signal, Inc., No. JFM-88-99, slip op. at 8-9 (D. Md. June 20, 1989) (insurer has no obligation to provide coverage to insured for cleanup costs); Grisham v. Maryland Casualty Co., No. 88-3063, slip op. at 2 (W.D. Ark. Jan. 18, 1989) (cleanup costs do not constitute sums the insured is legally obligated to pay as damages); Maryland Casualty Co. v. Ormond, No. 87-3038, slip op. at 12 (W.D. Ark. Jan. 6, 1989) (same); Ft. McHenry Lumber Co. v. Pennsylvania Lumbermen's Mut. Ins. Co., No. HAR 88-825, slip op. at 6 (D. Md. Sept. 23, 1988) (no coverage for costs incurred as a result of complying with remedial obligations imposed by consent agreement); Verlan, Ltd. v. John L. Armitage & Co., 695 F. Supp. 950, 955 (N.D. Ill. 1988) (under Illinois law, the insurer was not obligated to defend or indemnify the insured because the underlying complaint did not seek damages); Argonaut Ins. Co. v. Atlantic Wood Indus., No. 87-0323-R, order at 1 (E.D. Va. June 20, 1988) (environmental cleanup costs do not constitute damages within the meaning of the CGL policies); Travelers Ins. Co. v. Ross Elec. of Wash., 685 F. Supp. 742, 744-45 (W.D. Wash. 1988) (response costs are equitable in nature and, under Washington law, are not covered by the terms of the insurance policy); Hayes v. Maryland Casualty Co., 688 F. Supp. 1513, 1515 (N.D. Fla. 1988) (no coverage for expenses for investigation and clean up of contaminated groundwater because Florida state authority did not seek damages); Cincinnati Ins. Co. v. Medley, No. 87-1167-3, slip op. at 8 (D.S.D. Oct. 29, 1987) (government claims for cleanup costs are "prophylactic in nature" and therefore not covered under the terms of the policies), *aff'd sub nom.* Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979, 981 (4th Cir. 1988) (CGL policies do not provide coverage for claims seeking equitable relief); Nationwide Ins. Co. v. King, 673 F. Supp. 384, 387 (S.D. Cal. 1987) (no coverage for claims seeking equitable relief); Purex Indus., Inc. v. Proctor, No. C-446-935, slip op. at 2-4 (Cal. Super. Ct. Los Angeles County July 19, 1988) (no coverage for government suits seeking recovery of cleanup costs); Transport Indem. Ins. Co. v. Argonaut Ins. Co., No. 262425, order at 2 (Cal. Super. Ct. San Mateo County May 25, 1988) (insurers have no obligation to reimburse the government for costs expended in the cleanup of the contamination because policy language limits insurers' obligation to claims for damages); Garden Sanctuary, Inc. v. Insurance Co. of N. Am., 292 So. 2d 75, 77 (Fla. Dist. Ct. App. 1974) (no coverage for equitable claims for restoration of cemetery); Atlantic Wood Indus., Inc. v. Argonaut Ins. Co., No. X87-1019-4, slip op. at 10 (Ga. Super. Ct. May 30, 1989) (government claims for cleanup costs are not claims for damages); International Minerals & Chem. Co. v. Liberty Mut. Ins. Corp., No. 84-L-50979, slip op. at 9-10 (Ill. Cir. Ct. Cook County Jan. 6, 1987) (no coverage for the government claims that do not seek damages), *aff'd*, 168 Ill. App. 3d 361, 522 N.E.2d 758 (1988), *appeal denied*, 530 N.E.2d 246 (Ill. 1988); Jones v. Farm Bureau Mut. Ins. Co., 172 Mich. App. 24, 29, 431 N.W.2d 242, 245 (1988) (according

In *Continental Insurance Co. v. Northeastern Pharmaceutical and Chemical Co. (NEPACCO)*,⁷⁰ the United States Court of Appeals for the Eighth Circuit wrestled with the question of whether the CGL policy covered government mandated cleanup costs.⁷¹ In *NEPACCO*, the insurer brought suit against its insured, seeking a declaration that it was not obligated to defend or indemnify the insured in actions brought by governmental entities under subsection 9607(a)(4)(A) of CERCLA.⁷² On rehearing en banc, Judge McMillian, writing for the majority, held that cleanup costs were not dam-

to its plain and ordinary meaning, damages do not include strictly injunctive relief); *Hoskins-Western-Sonderegger, Inc. v. American & Foreign Ins. Co.*, No. 402, order at 5 (Neb. Dist. Ct. Lancaster County Feb. 1, 1989) (response costs are not damages recoverable under the policies); *County of Broome v. Aetna Casualty & Sur. Co.*, No. 86-0342, slip op. at 21 (N.Y. Sup. Ct. Broome County June 24, 1988) (no coverage for costs of instituting a remedial program), *aff'd on other grounds*, 146 A.D.2d 337, 540 N.Y.S.2d 620 (1989); *Lumberman's Underwriting Alliance v. Atlantic Wood Indus., Inc.*, No. 86-L-350, letter order at 1 (Va. Cir. Ct. Henrico County Oct. 7, 1988) (adopting the "better reasoned" opinions of *Armco* and *Mraz*). See also *Crist v. Insurance Co. of N. Am.*, 529 F. Supp. 601, 604 (D. Utah 1982) (insurers have a duty to defend claims for damages but not claims seeking injunctive relief); *Board of County Comm'rs v. Guarantee Ins. Co.*, 90 F.R.D. 405, 408 (D. Colo. 1981) (no coverage for attorneys' fees in suit for declaratory and injunctive relief); *O'Neill Investigations v. Illinois Employers Ins. of Wausau*, 636 P.2d 1170, 1176 (Alaska 1981) (no coverage for an action enjoining unlawful trade practices and seeking "as ancillary relief" restitution); *Jaffe v. Cranford Ins. Co.*, 168 Cal. App. 3d 930, 935, 214 Cal. Rptr. 567, 571 (1985) (payments of "restitutionary nature" are not damages); *Board of Educ. v. Country Mut. Co.*, 121 Ill. App. 3d 124, 127, 459 N.E.2d 273, 275 (1984) (no coverage in suit for writ of mandamus and injunctive relief); *Gulf & Western Indus., Inc. v. Seaboard Sur. Co.*, 100 A.D.2d 820, 821, 474 N.Y.S.2d 754, 755 (1984) (incidental expenses incurred as a result of complying with injunctive provisions of consent judgment are not damages and are not covered under the policy); *Seaboard Sur. Co. v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 81 Wash. 2d 740, 744, 504 P.2d 1139, 1143 (1973) (en banc) (no duty to defend suit for injunctive relief and restitution). Accord *Travelers Ins. Co. v. Waltham Indus. Laboratories Corp.*, No. 87-0760-MA, slip op. at 18 (D. Mass. Sept. 26, 1988) (because government action sought damages for injury to natural resources as well as recovery of cleanup costs, insurer has a duty to defend the suit); *Home Indem. Co. v. City of Marianna*, 291 Ark. 610, 616-18, 727 S.W.2d 375, 378-79 (1987) (because the insuring agreement contained the limiting term "as damages" and the policy endorsement did not mention damages, policy was ambiguous, and construing ambiguous provisions against the insurer, court held that the policy covered injunctive and declaratory relief).

70. 842 F.2d 977 (8th Cir.) (en banc) (5-3 decision), *cert. denied*, 109 S. Ct. 66 (1988).

71. *Id.* at 983. The United States District Court for the Western District of Missouri ruled that the insurer had no duty to defend or indemnify the CERCLA actions. No. 84-5034-CV-S-4, slip op. at 10-11 (W.D. Mo. June 25, 1985). The district court based its decision on the occurrence language, and not on the meaning of damages, in the insurance policy at issue. Because the damage or loss incurred by the Federal and State governmental entities occurred after the expiration of the insurance policy, the court found that there was no "occurrence" within the meaning of the liability insurance policy. *Id.* at 11. On appeal, a panel of the Eighth Circuit considered the question of whether cleanup costs were recoverable under the CGL policy. 811 F.2d 1180, 1181 (8th Cir. 1987) (panel decision). For a detailed discussion of the panel decision, see *infra* notes 161-66 and accompanying text.

72. 842 F.2d at 981.

ages within the meaning of the standard CGL policy.⁷³ Although conceding that environmental damage caused by improper disposal of hazardous wastes could constitute property damage, Judge McMillian found that the dispositive issue was whether cleanup costs fell within the meaning of damages.⁷⁴ In examining the issue, the court determined that the term "damages" was not ambiguous and that its plain meaning in the insurance context did not include equitable relief; it instead referred to legal damages.⁷⁵ The court reasoned that under the terms of the policy, the insurer was not liable to pay *all sums* the insured was legally obligated to pay; but all sums the insured was legally obligated to pay *as damages*.⁷⁶ Adopting a limited, technical interpretation of damages,⁷⁷ Judge McMillian held that the government claims for recovery of cleanup costs were equitable actions for monetary relief in the form of restitution and were not claims for damages under the CGL standard policy.⁷⁸

Three judges disagreed with the majority's narrow, technical interpretation of the term "damages."⁷⁹ Judge Heaney, writing for the dissent, contended that under Missouri law, if the language in an insurance policy was

73. *Id.* at 987.

74. *Id.* at 983.

75. *Id.* at 985. The court conceded that outside the insurance context, the word "damages" was ambiguous. *Id.* Because the dictionary definition of damages did not distinguish between legal damages and equitable monetary relief, the court agreed that "from the viewpoint of the lay insured, the term 'damages' [in a non-insurance context] could reasonably include all monetary claims, whether such claims [were] described as damages, expenses, costs, or losses." *Id.*

76. *Id.* at 986.

77. *Id.* The court justified its adoption of a limited interpretation of the term "damages" by referring to the statutory scheme of section 9607(a)(4) of CERCLA, which differentiated between recovery for cleanup costs and recovery for damages to natural resources. *Id.* The court contended that the distinction between cleanup costs and damages was not "fortuitous" and noted that there might be a significant difference between the liability for cleanup costs and the damage to natural resources, thereby affecting whether the government sues for cleanup costs or damages. *Id.* at 986-87 (citing *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1353 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988)).

78. 842 F.2d at 987. In September 1988, the District Court for the District of Columbia followed *NEPACCO* and concluded that under policies governed by Missouri law, there was "no coverage for governmental clean-up or response costs or injunctive relief." *Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co.*, No. 83-3347, slip op. at 220 (D.D.C. Sept. 7, 1988). The court, however, ruled that as to certain insurance policies governed by New York law, coverage existed for governmental cleanup costs. *Id.* at 221 (citing *Kutsher's Country Club Corp. v. Lincoln Ins. Co.*, 119 Misc. 2d 889, 465 N.Y.S.2d 136 (Sup. Ct. 1987) and *Powers Chemco, Inc. v. Federal Ins. Co.*, No. 8462/85 (N.Y. Sup. Ct. April 27, 1987), *aff'd on other grounds*, 144 A.D.2d 445, 533 N.Y.S.2d 1010 (1988), *appeal granted*, 74 N.Y.2d 602, 541 N.Y.S.2d 985 (1989)).

79. *NEPACCO*, 842 F.2d at 987 (Heaney, J., dissenting). Judge Heaney was joined by Chief Judge Lay and Judge Fagg. *Id.*

ambiguous, the court must assign it a meaning understood by the ordinary lay person who bought the policy.⁸⁰ The dissent objected to the majority's finding that the term "damages" was unambiguous.⁸¹ The dissent, moreover, disagreed with the majority's decision to define the term "damages" narrowly.⁸² Because the word "damages" was open to different constructions, the dissent argued that it must be accorded the interpretation understood by an ordinary lay person.⁸³ Applying the broader interpretation, the dissent concluded that the costs of restoring property to its predamaged condition constituted damages.⁸⁴

The United States Supreme Court recently confirmed the limiting interpretation accorded the term "damages" and the distinction between equitable monetary relief and legal damages in *Bowen v. Massachusetts*.⁸⁵ *Bowen*, a case outside the insurance context, involved a dispute over a federal district court's jurisdiction to review a decision by the Secretary of the United States Department of Health and Human Services to withhold certain categories of Medicaid expenses from state reimbursement.⁸⁶ In *Bowen*, the state requested that the court enjoin the Secretary from refusing to reimburse the state for medical expenses paid to eligible residents of health care facilities for the mentally retarded.⁸⁷ The Secretary argued that the federal court lacked jurisdiction under section 702 of the Administrative Procedure Act because the suit was not an action "seeking relief other than money damages" within the meaning of section 702.⁸⁸

The Supreme Court rejected the Secretary's argument and held that the relief sought by the state was not a claim for money damages.⁸⁹ Recognizing

80. *Id.* at 988 (citing *Robin v. Blue Cross Hosp. Serv.*, 637 S.W.2d 695, 698 (Mo. 1982) (en banc)).

81. 842 F.2d at 988.

82. *Id.*

83. *Id.* The dissent objected further to the majority's reliance on *Armco*, stating that because the term "damages" was given a narrow, technical meaning under Maryland law, Maryland law was inconsistent with the law established in Missouri. *NEPACCO*, 842 F.2d at 989-90. *But cf. supra* note 43 (even if the terms are ambiguous, the rules of construction should not apply if the insured is a sophisticated insured or if it is on the same bargaining level as the insurer).

84. *NEPACCO*, 842 F.2d at 988 (citing *Jack L. Baker Cos. v. Pasley Mfg. & Distrib. Co.*, 413 S.W.2d 268, 273 (Mo. 1967)).

85. 108 S. Ct. 2722 (1988) (6-3 decision).

86. *Id.* at 2726.

87. *Id.* at 2728 & n.10.

88. *Id.* at 2730-31. Section 702 of the Administrative Procedure Act provides that a court cannot dismiss an action which seeks relief "other than money damages" and which states that an agency or officer of an agency "acted or failed to act in an official capacity" merely because it is against the United States. 5 U.S.C. § 702 (1988).

89. *Bowen*, 108 S. Ct. at 2735.

the distinction between an action at law for damages and an equitable action for specific relief,⁹⁰ the Court noted that although money damages normally referred to " 'a sum of money used as compensatory relief,' "⁹¹ a monetary award could also be a specific remedy that was equitable in nature.⁹² But whereas damages were a substitute for a loss suffered, equitable monetary relief represented an attempt to restore the plaintiff to the status quo.⁹³ The Court concluded that relief which was essentially equitable in nature could not be characterized as money damages merely because the remedy required the payment of money.⁹⁴ Insurers, consequently, have relied upon the Supreme Court's treatment of the distinction between monetary equitable relief and legal damages to support their argument that monetary equitable relief does not constitute damages within the meaning of the CGL policy.⁹⁵

2. Coverage for Cleanup Costs: A Broad Interpretation of Damages

The Court of Appeals of Michigan rejected the *Hanna* court's interpretation of damages.⁹⁶ In *United States Aviex Co. v. Travelers Insurance Co.*,⁹⁷ the Michigan Department of Natural Resources required Aviex, the insured, to investigate and correct the contamination of groundwater caused by seepage of water used to extinguish a fire at the company's chemical manufacturing facility.⁹⁸ The insurer, interpreting damages as compensation for injury or loss, argued that costs incurred as a result of complying with injunctive orders were "noncompensatory."⁹⁹ Although the Michigan Court of Appeals found this argument persuasive,¹⁰⁰ it held that the insurer interpreted

90. *Id.* at 2731-32.

91. *Id.* at 2732 (quoting *Maryland Dep't of Human Resources v. Department of Health and Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)).

92. *Id.*

93. *Id.*

94. *Id.* at 2735.

95. See, e.g., Memorandum of Law of Commercial Union Insurance Company in Support of Motion for Summary Judgment at 32-34, *Grisham v. Maryland Casualty Co.*, No. 88-3063 (W.D. Ark. filed Jan. 10, 1989).

96. *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (1983).

97. *Id.*

98. *Id.* at 583, 336 N.W.2d at 840.

99. *Id.* at 588, 336 N.W.2d at 842.

100. *Id.* The insurer also argued that the policy did not cover damage to groundwater beneath the insured's property because the policy explicitly excluded damages to "property owned by the insured." *Id.* at 589, 336 N.W.2d at 843. The court rejected this argument and held that because the property owner did not own the percolating water, the provision excluding coverage for damage to insured's property did not apply. *Id.*; see also *Riehl v. Travelers Ins. Co.*, 22 Env't Rep. Cas. (BNA) 1544, 1546 (W.D. Pa. 1984) (surface and subsurface water on insured's property is not owned by insured), *rev'd on other grounds*, 772 F.2d 19 (3d Cir. 1985). But see *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 200 (W.D. Mo.

damages too narrowly.¹⁰¹ After determining that groundwater contamina-

1986) (finding that although coverage existed for groundwater contamination to prevent further damage to third parties, it did not exist for that "portion of the remedy [that] relates solely to damage to the CCC site itself . . ."); *E.C. Electro Plating, Inc. v. Federal Ins. Co.*, No. L-062919-85, slip op. at 2-3 (N.J. Super. Ct. Law Div. Bergen County Feb. 18, 1986) (finding coverage for contamination to groundwater but ordering defendants to undertake discovery to determine what portion of the remediation costs for groundwater purification are separate and distinct from costs taken to clean up insured's own property).

101. *Aviex*, 125 Mich. App. at 589, 336 N.W.2d at 843. A number of cases have followed the *Aviex* court's rejection of the legal, technical definition of damages. See *Avondale Indus., Inc. v. Travelers Indem. Co.*, No. 89-7035, slip op. at 17 (2d Cir. Oct. 18, 1989) (noting that the policy does not define damages, the court refused to accord the term a limited definition); *Jones Truck Lines v. Transport Indem. Co.*, No. 88-5723, slip op. at 20-21 (E.D. Pa. May 9, 1989) (disagreeing with *NEPACCO* and finding that the term "damages" in the standard CGL policy includes cleanup costs); *National Indem. Co. v. United States Pollution Control, Inc.*, No. 88-656-W, order at 3 (W.D. Okla. May 1, 1989) (damages includes "monies sought under CERCLA for response and clean-up of contamination"); *Triangle Publications, Inc. v. Liberty Mut. Ins. Co.*, 703 F. Supp. 367, 372 (E.D. Pa. 1989) (under Pennsylvania law, damages includes certain equitable relief); *Chesapeake Utils. Corp. v. American Home Assurance Co.*, 704 F. Supp. 551, 560 (D. Del. 1989) (rejecting legal, technical definition, court held that damages includes both legal and equitable remedies); *American Motorists Ins. Co. v. Levelor Lorentzen, Inc.*, No. 88-1994, slip op. at 6-8 (D.N.J. Oct. 14, 1988) (construing damages according to its ordinary meaning, court held that cleanup costs constitute damages); *F.L. Aerospace Corp. v. Aetna Casualty & Sur. Co.*, No. 87-CV-60070-AA, slip op. at 3-4 (E.D. Mich. Aug. 9, 1988) (finding that cleanup costs constitute damages); *Detrex Chem. Indus., Inc. v. Employers Ins. of Wausau*, 681 F. Supp. 438, 454-55 n.15 (N.D. Ohio 1987) (costs of evaluating and cleaning up contaminated soil constitute damages); *Commercial Union Ins. Co. v. Taxel*, No. 87-336-S, slip op. at 10 (S.D. Cal. Aug. 8, 1988) (cleanup costs constitute "damages because of property damage"); *Centennial Ins. Co. v. Lumbermens Mut. Casualty Co.*, 677 F. Supp. 342, 350 (E.D. Pa. 1987) (even if the action is equitable in nature, costs incurred in cleaning up property damage are damages within the CGL policy); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365 (D. Del. 1987) (legal, technical definition of the word "damages" is inappropriate under Delaware law); *Township of Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394, 399-400 (D.N.J. 1987) (cleanup costs constitute damages); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D. Mich. 1987) (money spent to clean up environmental contamination constitutes damages); *United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 214 (W.D. Mo. 1986) (defining damages as all sums which the insured is obligated to pay by reason of liability imposed by law); *Aer-ojet-General Corp. v. Superior Court*, 209 Cal. App. 3d 973, 983, 257 Cal. Rptr. 621, 627 (1989) (insured may reasonably expect coverage for environmental cleanup costs); *Union Oil Co. of California v. Simon Mui*, No. TR-617449-9, order at 2 (Cal. Super. Ct. Alameda County Jan. 30, 1989) (adopting a broad interpretation of damages and finding coverage for cleanup costs); *Shell Oil Co. v. Accident & Casualty Ins. Co. of Winterthur*, No. 278953, slip op. at 75-76 (Cal. Super. Ct. San Mateo County July 13, 1988) (tentative decision) (the word "damages" has no special or technical meaning and damages can encompass cleanup costs, abatement costs, prevention costs, and mitigation costs); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, 180 Ill. App. 3d 378, 391-92, 535 N.E.2d 1071, 1080 (1989) (legal, technical definition of damages is arbitrary and outdated and cleanup costs are essentially compensatory damages recoverable under the policy); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, No. 86-MR-308, slip op. at 4 (Ill. Cir. Ct. Lake County May 17, 1989) (bench ruling) (rejecting a limited interpretation of damages); *Hazen Paper Co. v. United States Fidelity & Guar. Co.*, No. 86-1679, slip op. at 6 (Mass. Super. Ct. Jan. 10, 1989) (under a broad interpre-

tion was "physical injury to tangible property" within the meaning of the policy,¹⁰² the court determined that if the state had sued for recovery of damages for harm to the state's groundwater quality, including the recovery of cleanup costs, the insurers would be obligated to pay damages.¹⁰³ Under the court's reasoning, the fact that the state required the plaintiff to clean up the contamination rather than cleaning up the contamination itself and subsequently suing for recovery of cleanup costs¹⁰⁴ was insufficient to preclude coverage because the damage to the natural resource was measured by the cost of restoration.¹⁰⁵ Thus, the court ruled that the insurance policy covered cleanup costs.¹⁰⁶

The District Court for the Western District of Michigan followed *Aviex* and adopted a broad interpretation of damages.¹⁰⁷ In *United States Fidelity & Guaranty Co. v. Thomas Solvent Co.*,¹⁰⁸ the insurers denied coverage,

tation of damages, cleanup costs constitute damages); *Upjohn Co. v. New Hampshire Ins. Co.*, No. 85-288651-CK, slip op. at 4 (Mich. Cir. Ct. Oakland County Jan. 5, 1987) (cleanup costs are recoverable damages), *aff'd*, No. 98969 (Mich. Ct. App. May 26, 1989); *Diamond Shamrock Chem. Co. v. Aetna Casualty & Sur. Co.*, No. C-3939-84, slip op. at 21 (N.J. Super. Ct. Ch. Div. Dec. 11, 1987) (bench ruling) (costs to cure environmental contamination are damages), *rev'd on other grounds*, 231 N.J. Super. 1, 554 A.2d 1342 (App. Div. 1989); *City of Farmington v. L.R. Foy Constr. Co.*, No. 87-271-1, order at 2 (N.M. Dist. Ct. San Juan County Dec. 21, 1988) (adopting *Aviex* court's interpretation of damages); *Sharon Steel Corp. v. Aetna Casualty & Sur. Co.*, No. C-87-2306, slip op. at 18-19 (Utah Dist. Ct. Salt Lake County July 20, 1988) (under law of Utah, response costs incurred in order to remedy environmental injury are covered damages); *Queens City Farms, Inc. v. Aetna Casualty & Sur. Co.*, No. 86-2-06236-0, slip op. at 7 (Wash. Super. Ct. King County Jan. 15, 1988) (all sums expended to clean up and remedy groundwater contamination constitute damages).

102. *Aviex*, 125 Mich. App. at 589, 336 N.W.2d at 843.

103. *Id.* at 589-90, 336 N.W.2d at 843. To reach this result, the court assumed that costs the government expended in cleaning up environmental contamination constituted damages. *See id.*

104. *Id.* at 590, 336 N.W.2d at 843.

105. *Id.* (citing *Chemical Applications Co. v. Home Indem. Co.*, 425 F. Supp. 777 (D. Mass. 1977); *Lansco, Inc. v. Department of Env'tl. Protection*, 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 N.J. 57, 372 A.2d 322 (1977)). These cases, however, did not deal with the issue of whether cleanup costs constituted damages within the meaning of the insurance policy. In *Lansco*, the issue was whether the State of New Jersey had sustained property damage when oil leaked from storage tanks onto the property. 138 N.J. Super. at 282-83, 350 A.2d at 524. The court, without analyzing the meaning of the word "damages," concluded that the insurer was obligated to indemnify *Lansco* for the costs of removal of the oil. *Id.* at 286, 350 A.2d at 526. The court in *Chemical Applications* likewise did not discuss whether the cleanup costs incurred as a result of an oil spill fell within the meaning of damages. In spite of this omission, the court held that the insurer could not deny liability for costs of cleaning up the spill. 425 F. Supp. at 779-80.

106. *Aviex*, 125 Mich. App. at 590, 336 N.W.2d at 843.

107. *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich.), *vacated on other grounds*, 683 F. Supp. at 1177 (W.D. Mich. 1988).

108. *Id.*

claiming that the state and federal actions for recovery of response costs pursuant to CERCLA were not damages on account of property damage.¹⁰⁹ The court focused on the question of whether cleanup costs were sums the insured was liable to pay because of property damage.¹¹⁰ Once the court determined that environmental contamination caused property damage, it held that cleanup costs were "sums the insured was liable to pay as a result of property damage."¹¹¹ Finding that the contractual understanding controlled the question of "damages because of property damage," the court reasoned that the insured was entitled to rely on "the common sense expectation that property damage within the meaning of the policy include[d] a claim which result[ed] in causing him to pay sums of money because his acts or omissions affected adversely the rights of third parties."¹¹² The district court maintained that although government claims for recovery of cleanup costs might seek equitable relief, these claims were essentially compensatory damages for injury to common property and were covered under the CGL policy.¹¹³

The United States District Court for the Northern District of California also refused to construe the term "damages" narrowly. In *Intel Corp. v. Hartford Accident & Indemnity Co.*,¹¹⁴ the insured entered into a consent decree with the United States Environmental Protection Agency, which required the insured to pay remedial and response costs in the cleanup of a site that had suffered both soil and groundwater contamination.¹¹⁵ In its initial discussion of coverage, the court rejected a superior court decision from Los Angeles County, which held that reimbursement for response costs did not

109. *Id.* at 1168.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* See also *Solvents Recovery Serv. of New England v. Midland Ins. Co.*, No. L-25610-83, op. at 23 (N.J. Super. Ct. Law Div. Nov. 17, 1986) (noting that the key issue was the essential nature of damages and not whether the government sought compensatory or equitable relief, court held that cleanup costs are essentially compensatory damages recoverable under the insurance policy), *rev'd on other grounds*, 218 N.J. Super. 49, 526 A.2d 1112 (App. Div. 1987); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 72 N.C. App. 80, 93, 323 S.E.2d 726, 735 (1984) (although equitable relief, costs to prevent further harm are strongly remedial and are therefore "essentially compensatory damages for injury to common property"), *rev'd on other grounds*, 315 N.C. 688, 340 S.E.2d 374 (1986). But see *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 434 (D. Md. 1986) (insurer was not obligated to defend or indemnify hypothetical suits but rather "real" ones), *aff'd*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988); *Ladd Constr. Co. v. Insurance Co. of N. Am.*, 73 Ill. App. 3d 43, 48, 391 N.E.2d 568, 572-73 (1979) (court's speculation as to whether to award damages when none are sought will alter the obligation of the insurer as set forth in the insurance policy).

114. 692 F. Supp. 1171 (N.D. Cal. 1988).

115. *Id.* at 1173.

constitute property damage within the meaning of the insurance policy.¹¹⁶ The district court specifically rejected the superior court's reliance on *Armco* and found that the state court "offer[ed] nothing in the way of independent analysis or an evaluation of the competing approaches to the issue."¹¹⁷ Noting that the California appellate courts had not spoken on this issue, the district court accepted responsibility for determining the course of the California Supreme Court.¹¹⁸

The district court first held that damage to underground water was damage to tangible property.¹¹⁹ Once the court determined that the insured had injured property of a third party, it addressed the issue of whether the cleanup of contamination to that property constituted damages within the terms of the policy.¹²⁰ Emphasizing that state law was dispositive of the issue,¹²¹ the court rejected the Fourth and Eighth Circuits' narrow definition of damages.¹²² Applying California law, the court ruled that where the people and State of California had suffered a detriment from the unlawful acts or omissions of the insured, they were entitled to damages.¹²³ The court

116. *Id.* at 1184 (citing Protective Nat'l Ins. Co. of Omaha v. Union Oil Co., No. C-514-463, slip op. at 3-4 (Cal. Super. Ct. Los Angeles County Nov. 24, 1987)).

117. *Id.* at 1185.

118. *Id.*

119. *Id.* at 1185-86. The district court expressly followed decisions applying the laws of Oregon, Michigan, and Puerto Rico. *Id.* at 1185. See *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986) (concluding that the Oregon Supreme Court would have held that discharge of pollution into water caused damage to tangible property); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D. Mich. 1987) (following *Aviex* and applying Michigan law); *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 589, 336 N.W.2d 838, 843 (1983) (contamination of groundwater as a result of fire was physical injury to tangible property); *Upjohn Co. v. New Hampshire Ins. Co.*, No. 85-288651-CK, slip op. at 10 (Mich. Cir. Ct. Oakland County Jan. 5, 1987) (under Puerto Rico law, damage caused by chemical spill was damage to property of third persons), *aff'd*, No. 98969 (Mich. Ct. App. May 26, 1989).

120. *Intel*, 692 F. Supp. at 1186.

121. *Id.* at 1189.

122. *Id.* at 1186-87. The district court criticized the *Mraz* court because it based its analysis concerning the definition of property damage on federal law, rather than on relevant Maryland precedent. *Id.* In addition, the court maintained that although the Fourth Circuit in *Armco* attempted to apply the law of the forum state, it failed to do so. *Id.* But while the *Intel* court agreed with the Eighth Circuit's finding in *NEPACCO* that the law of the forum state applied, it disagreed with the majority's holding that cleanup costs did not constitute damages within the meaning of the CGL policy. *Id.* at 1188 & n.24.

123. *Id.* at 1189. The court based its holding on the California Civil Code. California Civil Code section 3281 provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor [sic] in money, which is called damages." CAL. CIV. CODE § 3281 (West 1989). Noting that the statutory definition of "detriment" was "loss or harm suffered in person or property", the court found that "detriment" was synonymous with "damage" under California law. 692 F. Supp. at 1189 n.25 (citing CAL. CIV. CODE § 3282 (West 1989)).

found that the insured was legally obligated to pay all costs of cleanup,¹²⁴ including costs incurred to prevent and mitigate damage to third parties.¹²⁵

124. *Intel*, 692 F. Supp. at 1190.

125. *Id.* at 1194. Some courts have held that the CGL policy covers costs incurred as a result of preventing environmental contamination to adjacent property, even though the policy excludes "damages to property owned or occupied by or rented to the insured" or "property in the care, custody or control of the insured." See, e.g., *Allstate Ins. Co. v. Quinn Constr. Co.*, 713 F. Supp. 35 (D. Mass. 1989) (owned property exclusion does not bar coverage for costs incurred as a result of cleaning up environmental contamination that "presented a demonstrated danger to the property of another"); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 662 F. Supp. 71, 75 (E.D. Mich. 1987) (owned property exclusion does not preclude coverage where the government claims allege property damage to third parties); *Township of Gloucester v. Maryland Casualty Co.*, 668 F. Supp. 394, 400 (D.N.J. 1987) (cleanup costs are not excluded from coverage on the basis of the owned property exclusion because costs of repairing insured's property are inextricably linked to the government claims for cleanup of property of third parties); *Consolidated Rail Corp. v. Certain Underwriters at Lloyds*, No. 84-2609, slip op. at 11-12 (E.D. Pa. June 3, 1986) (expenditures incurred to clean up and mitigate harm to third parties are recoverable under the policy, even though these expenditures may be expended in part to clean up insured's own property), *aff'd*, 853 F.2d 917 (3d Cir. 1988); *Riehl v. Travelers Ins. Co.*, 22 Env't Rep. Cas. (BNA) 1544, 1546 (W.D. Pa. 1984) (groundwater is not property owned by insured and abatement costs to prevent future pollution are damages within the meaning of the policy), *rev'd on other grounds*, 772 F.2d 19 (3d Cir. 1985); *Bankers Trust Co. v. Hartford Accident & Indem. Co.*, 518 F. Supp. 371, 373 (S.D.N.Y. 1981) (coverage for work performed to prevent oil seepage from continuing), *vacated on other grounds*, 621 F. Supp. 685 (S.D.N.Y. 1981); *Upjohn Co. v. New Hampshire Ins. Co.*, No. 85-288651-CK, slip op. at 10 (Mich. Cir. Ct. Jan. 5, 1987) (coverage for costs of purifying groundwater contaminated by spill even though the spillage may be removed from the insured's own property), *aff'd*, No. 98969 (Mich. Ct. App. May 26, 1989); *CPS Chem. Corp. v. Continental Ins. Co.*, 222 N.J. Super. 175, 188, 536 A.2d 311, 317 (App. Div. 1988) (insurers are obligated to indemnify insured for sums the insured incurred as a result of abating the migration of contaminants where migration is continuous and peril to health and the environment is immediate); *Broadwell Realty Serv. v. Fidelity & Casualty Co. of N.Y.*, 218 N.J. Super. 516, 527-28, 528 A.2d 76, 82 (App. Div. 1987) (abatement measures performed to prevent continued destruction of adjacent property constitute recoverable damages where contamination is continuous and ongoing and where peril is imminent and immediate); *New Jersey v. Signo Trading Int'l, Inc.*, No. C-2995-83, slip op. at 33-34 (N.J. Super. Ct. Ch. Div. May 25, 1988) (bench ruling) (same); *E.C. Electro Plating, Inc. v. Federal Ins. Co.*, No. L-062919-85, slip op. at 2-3 (N.J. Super. Law Div. Bergen County Feb. 18, 1986) (coverage for liability resulting from discharge, including costs necessary to clean the environment and prevent future environmental harm); *Leebov v. United States Fidelity & Guar. Co.*, 401 Pa. 477, 480, 165 A.2d 82, 84 (1960) (policy covers expenses incurred to prevent damage from landslide); *Lehigh Elec. & Eng'g Co. v. Selected Risks Ins. Co.*, 30 Pa. D. & C.3d 120, 126-27 (Ct. C.P. 1982) (costs incurred as a result of preventing or mitigating damage to property are covered under the policy where the release of hazardous substances has caused an imminent and substantial danger to property of third parties); *Aronson Assocs. v. Pennsylvania Nat'l Mut. Casualty Ins. Co.*, 14 Pa. D. & C.3d 1, 8 (Ct. C.P. 1977) (insured has a legal obligation to take measures to prevent seepage of gasoline into underground water supplies), *aff'd*, 272 Pa. Super. 606, 422 A.2d 689 (1979). *Accord United States v. Conservation Chem. Co.*, 653 F. Supp. 152, 200 (W.D. Mo. 1986) (coverage to prevent further damage to third parties and no coverage to remedy damage confined to insured's own property); *Shell Oil Co. v. Accident & Casualty Ins. Co. of Winterthur*, No. 278953, slip op. at 73 (Cal. Super. Ct. San Mateo County July 13, 1988) (tentative decision)

The court concluded that the California Supreme Court would hold that *all* costs expended by the insured in investigating and cleaning up pollution that posed an established threat to public health were covered under the CGL policy.¹²⁶

*Chesapeake Utilities Corp. v. American Home Assurance Co.*¹²⁷ represents another departure from the application of a legal, technical definition of damages. In *Chesapeake Utilities*, the States of Maryland and Delaware asserted environmental claims¹²⁸ against the insured for remedial and response action at a Maryland site¹²⁹ and for costs incurred in the cleanup of a Delaware site.¹³⁰ With regard to the Maryland site, the insurers argued that be-

(coverage for remedial measures taken on insured's property where remedial measures are necessary to prevent imminent harm to third parties and no coverage for response costs expended solely to clean up insured's property); *Lido Co. of New England, Inc. v. Firemans Fund Ins. Co.*, CV-87-428, order at 1-2 (Me. Super. Ct. Jan. 5, 1989) (insurer is not obligated to reimburse the insured for costs expended solely in the cleanup of the insured's own property); *Diamond Shamrock Chem. Co. v. Aetna Casualty & Sur. Co.*, 231 N.J. Super. 1, 15-16, 554 A.2d 1342, 1350 (App. Div. 1989) (remanded for a determination as to whether there is a threat of damage to property of third parties); *Summit Assocs., Inc. v. Liberty Mut. Fire Ins. Co.*, 229 N.J. Super. 56, 64, 550 A.2d 1235, 1239 (App. Div. 1988) (remanded for a determination as to whether the threatened damage to third parties is imminent and immediate or whether it is "an undefined and speculative future loss" excluded from coverage); *Atlantic City Mun. Utils. Auth. v. Cigna Cos.*, No. A-1320-84T7, slip op. at 5 (N.J. Super. Ct. App. Div. Dec. 19, 1985) (no coverage where measures protected insured's own property and its underground water supply against threat of contamination in distant future). *But cf.* *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1353-54 (4th Cir. 1987) (CGL policy does not provide coverage for measures taken to prevent potential injury to property), *cert. denied*, 108 S. Ct. 703 (1988); *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 132, 106 A.2d 196, 198 (1954) (insurer not obligated to reimburse the insured for contingent and prospective injuries).

126. *Intel*, 692 F. Supp. at 1192. Intel subsequently moved for summary judgment, seeking a declaration that the insurer must reimburse it for all past damages incurred in the investigation and cleanup of the contamination. *Intel Corp. v. Hartford Accident & Indem. Co.*, No. C-87-20434 RPA, slip op. at 10 (N.D. Cal. Nov. 7, 1988). The district court denied the request for a lump sum reimbursement, holding that an evidentiary hearing was required for a determination of the "reimbursable damages." *Id.* at 13-14. In particular, the court determined that the insurer was not required to pay for those expenses pertaining solely to damage to the insured's own property. *Id.* at 11. Moreover, the court suggested that the insurer was not obligated to pay all costs expended in an investigation into the scope of an injury. *Id.* at 13-14.

127. 704 F. Supp. 551 (D. Del. 1989).

128. The State of Maryland demanded that Chesapeake Utilities investigate the potential contamination of groundwater beneath the Maryland site. *Id.* at 553. Chesapeake Utilities incurred costs as a result of remedying the pollution. *Id.* at 553-54. The State of Maryland, however, did not bring a lawsuit against Chesapeake. *Id.* at 553 n.5. The district court noted that the state could have brought an action against Chesapeake Utilities pursuant to CERCLA. *Id.* Whereas the State of Maryland did not expend costs in cleaning up the Maryland site, the State of Delaware incurred costs in monitoring and cleaning up the Delaware site. *Id.* at 554. The State of Delaware also did not file suit against Chesapeake Utilities. *Id.* at 554 n.7.

129. *Id.* at 553-54.

130. *Id.* at 554.

cause the insured's remedial actions were equitable remedies, and not damages, the costs of those activities were not covered under the insurance policies at issue.¹³¹ The insurers similarly argued that the costs incurred in the cleanup of the Delaware site did not constitute damages within the meaning of the policies.¹³²

The United States District Court for the District of Delaware rejected the insurers' arguments and held that, under the laws of both Maryland and Delaware,¹³³ cleanup costs constituted damages.¹³⁴ In determining the existence of coverage for remedies sought by the State of Maryland, the district court refused to follow *Armco*, claiming that *Armco* misstated Maryland law.¹³⁵ Under Maryland law, the court must interpret unambiguous terms in an insurance contract according to their plain and ordinary meaning.¹³⁶ Where, however, the terms are ambiguous, the court will construe the policy language against the insurer.¹³⁷ When language in an insurance policy is susceptible to more than one meaning, the court will find it ambiguous.¹³⁸ Applying these rules of construction, the court found that the word "damages" was ambiguous and that it must therefore construe the term against the insurer.¹³⁹ Thus, the district court, without defining the term

131. *Id.* at 555.

132. *Id.*

133. The court determined that Maryland law governed those claims pertaining to the Maryland site, while Delaware law controlled the claims relating to the Delaware site. *Id.* at 557.

134. *Id.* at 560, 565.

135. *Id.* at 558.

136. *Id.* at 559.

137. *Id.*

138. *Id.*

139. *Id.* at 560.

"damages," rejected the legal, technical definition adopted in *Armco*¹⁴⁰ and held that legal and equitable relief fell within the term "damages."¹⁴¹

B. Insurance Coverage for Damages Because of Property Damage

Courts are also divided on the second argument advanced by the insurance companies against coverage for cleanup costs; namely, that cleanup costs are not the measure of property damage. Some courts have held that government claims for cleanup costs pursuant to CERCLA are not claims for property damage within the meaning of the insurance policy.¹⁴² Several

140. *Id.* The district court noted that even if the term "damages" was unambiguous, it should accord the word a plain and ordinary meaning, not the legal, technical meaning adopted by *Armco*. *Id.* at 559-60. The court reasoned that a definition based on the distinction between law and equity was not a meaning a reasonable lay person could ordinarily infer. *Id.* at 560; *see also* *FMC Corp. v. Liberty Mut. Ins. Co.*, No. 643058, slip op. at 16 (Cal. Super. Ct. Santa Clara County Jan. 3, 1989) (ordinary lay person cannot be expected to understand the "fine distinctions between law and equity"). The court, in applying the plain and ordinary meaning to the term, construed the word "damages" according to the reasonable expectations doctrine, that is, what a reasonable person in the position of the insured would have understood the term to mean. *Chesapeake Utils.*, 704 F. Supp. at 560; *see also* *Avondale Indus. v. Travelers Indem. Co.*, No. 86-9626 (KC), slip op. at 10-11 (S.D.N.Y. Oct. 19, 1988) (construing damages according to the reasonable expectation and purpose of the ordinary businessman, court found coverage for cleanup costs), *aff'd*, No. 89-7035 (2d Cir. Oct. 18, 1989); *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365 (D. Del. 1987) (court rejected legal, technical definition of damages in *Armco* and adhered to reasonable expectation of insured); *Liberty Mut. Ins. Co. v. Certain Underwriters at Lloyds*, 650 F. Supp. 1553, 1560-61 (W.D. Pa. 1987) (construing damages in accordance with the plain meaning of the term and the reasonable expectations of the insured, court held that an award for back pay constitutes damages); *Aerojet-General Corp. v. Superior Court*, 209 Cal. App. 3d 973, 983, 257 Cal. Rptr. 621, 627 (1989) (insured can reasonably conclude that policy covered "environmental cleanup costs, imposed upon it by the government to remedy and prevent property damage, as well as traditional legal damages"); *Globe Indem. Co. v. California*, 43 Cal. App. 3d 745, 751, 118 Cal. Rptr. 75, 79 (1974) (interpreting the policy according to the reasonable and normal expectations of the insured, the court determined that costs expended to suppress a fire are recoverable sums the insured is liable to pay because of property damage); *Broadwell Realty Serv. v. Fidelity & Casualty Co. of New York*, 218 N.J. Super. 516, 526, 528 A.2d 76, 81 (App. Div. 1987) (court determined that a finding of coverage for expenses the insured incurred to prevent continued release of hazardous substances onto property of third parties is consistent with reasonable expectations of insured).

141. *Chesapeake Utils.*, 704 F. Supp. at 560. Similarly, the court held that under Delaware law, cleanup costs are damages. *Id.* at 565 (relying on *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359 (D. Del. 1987)).

142. *See, e.g.*, *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1329 (4th Cir. 1986); *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. 958, 961 (D. Idaho 1989) (response cost liability under CERCLA is not based upon the existence of property damage); *Protective Nat'l Ins. Co. of Omaha v. Insurance Co. of Pa.*, No. C-514-463, slip op. at 4 (Cal. Super. Ct. Los Angeles County Nov. 24, 1987) (finding that the language of the policy pertains to "damage to property in the traditional sense" and holding that response costs are not the measure of property damage).

courts, in contrast, have concluded that cleanup costs are recoverable sums the insured is liable to pay because of property damage.¹⁴³

1. No Coverage for Environmental Contamination: The Nature of the Relief Sought in the CERCLA Actions

The United States Court of Appeals for the Fourth Circuit addressed the issue of whether the underlying government actions sought damages for property damage.¹⁴⁴ The court, in *Mraz v. Canadian Universal Insurance Co.*,¹⁴⁵ first questioned whether the Federal and State governments sought relief for the contamination of the site at issue or whether they merely alleged a factual basis for reimbursement of cleanup costs.¹⁴⁶ The Fourth Circuit differentiated between the nature of the relief sought in the underlying government suits, namely the recovery of cleanup or response costs under CERCLA subsection 9607(a)(4)(A),¹⁴⁷ and the recovery of actual damage to natural resources permitted under subsection 9607(a)(4)(C),¹⁴⁸ which the Federal and State governments did not seek in the underlying complaints.¹⁴⁹ Although the underlying complaints alleged that property damage occurred, the property damage allegations did not form the basis of the relief sought. Rather, the governments requested reimbursement of cleanup costs.¹⁵⁰ Emphasizing that property damage and response costs were independent, the court determined that it could not equate response costs with the definition of property damage contained in the insurance policy at issue.¹⁵¹ Because the underlying government complaints did not allege a claim of property

143. See *infra* note 160 and accompanying text.

144. *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986).

145. *Id.*

146. *Id.* at 1329. The Fourth Circuit criticized the lower court's analysis of coverage. See *id.* at 1329-30. In *Mraz v. American Universal Ins. Co.*, the United States District Court for the District of Maryland rejected the insurer's claim that reimbursement of cleanup costs incurred at a hazardous waste dump site was not on account of property damage within the meaning of the liability insurance policy. 616 F. Supp. 1173, 1179 (D. Md. 1985), *rev'd sub nom.* *Mraz v. Canadian Universal Ins. Co.*, 824 F.2d 1325 (4th Cir. 1986). The district court found that water contamination was property damage for insurance purposes. *Id.* Because the underlying suit alleged that the leakage from drums dumped at the site caused contamination of soil and water which necessitated cleanup, the court concluded that the complaint alleged property damage and that the insurer's duty to defend the underlying government suit was triggered. *Id.*

147. 42 U.S.C. § 9607(a)(4)(A) (1982 & Supp. V 1987).

148. *Id.* § 9607(a)(4)(C).

149. *Mraz*, 804 F.2d at 1328-29.

150. *Id.* at 1329.

151. *Id.* The definition of property damage contained in Canadian Universal's policy provided that property damage was "injury to or destruction of tangible property." *Id.*

damage, but rather an economic loss,¹⁵² the court concluded there was no insurance coverage for the cleanup of the hazardous waste disposal site.¹⁵³

2. Coverage for Environmental Contamination: The Measure of Property Damage

In *Lansco, Inc. v. Department of Environmental Protection*,¹⁵⁴ the insurer denied coverage for costs incurred by the insured as a result of cleaning up an oil spill.¹⁵⁵ Reading the term "property damage" to mean "measurable damage to identifiable physical property,"¹⁵⁶ the insurer claimed that coverage did not extend to sums the state had recovered from the insured to clean up environmental contamination.¹⁵⁷ The court found that this argument was without merit and recognized that the state had a right to obtain dam-

152. Courts have held that strict economic losses do not constitute property damage under the terms of the CGL policy. See, e.g., 11 G. COUCH, COUCH ON INSURANCE 2D § 44.287 (rev. ed. 1982) ("[s]trictly economic losses . . . are not damage or injury to tangible property and do not constitute the requisite property damage."). See also *Lassen Canyon Nursery, Inc. v. Royal Ins. Co. of Am.*, 720 F.2d 1016, 1018 (9th Cir. 1983) (economic losses, such as lost profits or good will, are not property damage); *Lazzara Oil Co. v. Columbia Casualty Co.*, 683 F. Supp. 777, 780-81 (M.D. Fla. 1988) (economic losses do not constitute injury to tangible property), *aff'd without opinion*, 868 F.2d 1274 (11th Cir. 1989); *Stone & Webster Eng'g Corp. v. American Motorists Ins. Co.*, 458 F. Supp. 792, 796-97 (E.D. Va. 1978) (installation of defective supports in a nuclear power plant not yet constructed does not constitute property damage), *aff'd*, 628 F.2d 1351 (4th Cir. 1980); *McCullum v. Insurance Co. of N. Am.*, 132 Ariz. 129, 132, 644 P.2d 283, 286 (Ct. App. 1982) (no coverage for lost profits on land purchases); *Giddings v. Industrial Indem. Co.*, 112 Cal. App. 3d 213, 219, 169 Cal. Rptr. 278, 281 (1980) (strict economic losses, such as lost profits, loss of goodwill, loss of investment, do not constitute property damage); *United States Fidelity & Guar. Co. v. Wilkin Insulation Co.*, No. 84-CH-11676, slip. op. at 7 (Ill. Cir. Ct. Cook County Aug. 14, 1987) (no allegation of property damage because the cost of inspection, removal, and replacement of asbestos products is an economic loss); *CMO Graphics, Inc. v. CNA Ins.*, 115 Ill. App. 3d 491, 496-97, 450 N.E.2d 860, 863-64 (1983) (same); *County of Monroe v. Travelers Ins. Co.*, 100 Misc. 2d 417, 419, 419 N.Y.S.2d 410, 413 (Sup. Ct. Monroe County 1979) (cost of performing additional work because of collapse of construction project does not constitute property damage), *aff'd*, 75 A.D.2d 1025 (1980); *Hobson Constr. Co. v. Great Am. Ins. Co.*, 71 N.C. App. 586, 591, 322 S.E.2d 632, 635 (1984) (costs of repairing dam are not based on property damage), *review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985).

153. *Mraz*, 804 F.2d at 1329. In March 1989, the United States District Court for the District of Idaho followed the reasoning in *Mraz* and held that because liability of the insured for cleanup costs was not based on the existence of property damage, the policy did not cover these costs. *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. 958, 961 (D. Idaho 1989).

154. 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 N.J. 57, 372 A.2d 322 (1977).

155. *Id.* at 280, 350 A.2d at 523. The New Jersey Department of Environmental Protection requested that Lansco undertake the cleanup efforts. *Id.* at 279, 350 A.2d at 522.

156. *Id.* at 282, 350 A.2d at 524.

157. *Id.*

ages for injuries to natural resources as well as to the environment.¹⁵⁸ Because Lansco could have reasonably expected indemnification for claims arising out of the operation of its business not otherwise excluded from the policy, the court found that the insurer had an obligation to pay Lansco for cleanup costs.¹⁵⁹ The court concluded that the amount Lansco was legally obligated to pay to the state, and therefore the amount of the insurer's obligation to indemnify Lansco, was determined by the cost of cleaning up the spill.¹⁶⁰ In so holding, the court rejected the insurer's definition of property damage.

A panel decision of the Eighth Circuit similarly determined that cleanup costs are the measure of property damage. In *Continental Insurance Co. v.*

158. *Id.* at 283, 350 A.2d at 524.

159. *Id.*

160. *Id.* at 284, 350 A.2d at 525. *Lansco* established a basis upon which other courts have relied in holding that cleanup costs are damages because of property damage. See, e.g., *Unigard Mut. Ins. Co. v. McCarty's, Inc.*, No. 83-1441, slip op. at 5 (D. Idaho June 5, 1987) (where government alleges soil contamination, cleanup costs cannot be excluded from coverage on the basis of the property damage provisions); *Port of Portland v. Water Quality Ins. Syndicate*, 549 F. Supp. 233, 235 (D. Or. 1982) (adopting the "'reasonable, enlightened view'" of *Lansco* that environmental pollution constitutes property damage), *aff'd in part, rev'd in part*, 796 F.2d 1188 (9th Cir. 1986); *Chemical Applications Co. v. Home Indem. Co.*, 425 F. Supp. 777, 778 (D. Mass. 1977) (costs of removing oil spill in navigable waters constitutes property damage); *United States Fidelity & Guar. Co. v. Specialty Coatings Co.*, No. 84-L-51188, slip op. at 9 (Ill. Cir. Ct. Cook County Nov. 16, 1987) (government actions for recovery of cleanup costs have alleged property damage within the definition of the policy), *aff'd*, 180 Ill. App. 3d 378, 535 N.E.2d 1071 (1989); *Kearsarge Metallurgical Corp. v. Travelers Ins. Co.*, No. E-83-460, order at 7-8 (N.H. Super. Ct. Jan. 12, 1986) (finding coverage for injunctive relief which sought "compensation to remedy injury" to groundwater); *Solvents Recovery Serv. of New England v. Midland Ins. Co.*, No. L-25610-83, slip op. at 17 (N.J. Super. Ct. Law Div. Nov. 17, 1986) (bench ruling) (all costs incurred in the cleanup of hazardous waste site are property damage or costs incurred because of property damage), *aff'd*, 218 N.J. Super. 49, 526 A.2d 1112 (App. Div. 1987); *Powers Chemco, Inc. v. Federal Ins. Co.*, No. 8462/85, slip op. at 4 (N.Y. Super. Ct. Nassau County Apr. 27, 1987) (costs of complying with governmental order which are attributed to restoring groundwater and environment to a precontamination state and preventing future contamination constitute damages within the meaning of the policy), *modified on other grounds*, 144 A.D.2d 445, 533 N.Y.S.2d 1010 (1988), *appeal granted*, 74 N.Y.2d, 541 N.Y.S.2d 985 (1989); *Kutsher's Country Club Corp. v. Lincoln Ins. Co.*, 119 Misc. 2d 889, 893, 465 N.Y.S.2d 136, 139 (Sup. Ct. Sullivan County 1983) (following *Lansco*); *Sharon Steel Corp. v. Aetna Casualty & Sur. Co.*, No. C-87-2306, slip op. at 20 (Utah Dist. Ct. Salt Lake County July 20, 1988) (coverage for response costs sought by the government to remedy property damage); *Queen City Farms, Inc. v. Aetna Casualty & Sur. Co.*, No. 86-2-06236-0, slip op. at 5 (Wash. Super. Ct. Jan. 15, 1988) (groundwater contamination constitutes covered property damage); *Wagner v. Milwaukee Mut. Ins. Co.*, 145 Wis. 2d 609, 613 n.3, 427 N.W.2d 854, 856 n.3 (Ct. App. 1988) (where property damage has occurred, cleanup costs necessitated by that damage are covered under the policy); *Compass Ins. Co. v. Cravens, Dargan & Co.*, 748 P.2d 724, 727-28 (Wyo. 1988) (oil spill resulting in contamination of third parties' property constitutes property damage).

NEPACCO,¹⁶¹ Circuit Judge Heaney, writing for a panel of the court, disagreed with the insurer's contention that the injury suffered by the governmental entities from the improper disposal was an economic loss.¹⁶² Finding that Federal and State governments had property interests in wildlife, water, and natural resources, the court determined that damage to tangible property such as land, trees, air, and water fell within the definition of property damage.¹⁶³ The court concluded that damage to the environment caused by the dumping of toxic wastes was property damage¹⁶⁴ and that cleanup costs were a measure of that damage.¹⁶⁵ Thus, once the court found that property damage occurred, it held that cleanup costs were recoverable as sums the insured was legally obligated to pay as damages because of property damage.¹⁶⁶

Insurance coverage for government mandated cleanup costs, however, is not based solely on a determination of whether cleanup costs are the measure of property damage. On rehearing en banc,¹⁶⁷ the Eighth Circuit determined that while the improper disposal of hazardous waste could cause environmental damage, the dispositive issue was whether cleanup costs constituted damages.¹⁶⁸ Because the court ruled that cleanup costs did not fall within the meaning of the term "damages," thereby precluding coverage,¹⁶⁹ the court did not consider the issue of whether cleanup costs were the measure of property damage.¹⁷⁰ Had the Eighth Circuit reached the contrary result, namely, that damages included cleanup costs and other equitable relief, it would appear that the court would have then addressed the second

161. 811 F.2d 1180 (8th Cir.) (panel decision), *reh'g en banc granted*, 815 F.2d 51 (8th Cir. 1987), *aff'd in part, rev'd in part*, 842 F.2d 977 (8th Cir.), *cert. denied*, 109 S. Ct. 66 (1988).

162. 811 F.2d at 1184.

163. *Id.* at 1186.

164. *Id.* at 1189 (relying, *inter alia*, on the reversed decision in *Mraz v. American Universal Ins. Co.*, 616 F. Supp. 1173, 1177 (D. Md. 1985) (because the underlying government complaint alleged that the release of the insured's wastes caused contamination of soil and water resulting in the need for cleanup, it alleged property damage), *rev'd sub nom.* *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325 (4th Cir. 1986)).

165. *Id.* at 1188-89. The panel justified its conclusion that cleanup costs were a measure of damages to property by looking at the CERCLA provisions and the language of the CGL policies at issue. With regard to section 9607(a)(4) of CERCLA, the court stated that, although subsection 9607(a)(4)(C) directly provided for damage to natural resources, subsections (A) and (B) were measures of the damages to natural resources that the government was entitled to recover. *Id.* at 1188.

166. *Id.* at 1189.

167. *Continental Ins. Cos. v. NEPACCO*, 842 F.2d 977 (8th Cir. 1988), *cert. denied*, 109 S. Ct. 66 (1988).

168. *Id.* at 983.

169. *Id.* at 987.

170. *Id.* at 983.

issue of whether the government complaint sought compensation for injury to property.

III. RESOLVING THE DEFINITIONAL DILEMMA: THE SPECIFIC MEANING OF POLICY TERMS

To resolve the question of insurance coverage for government mandated cleanup costs, courts have addressed two issues. The first issue pertains to the nature of the relief sought and concerns whether cleanup costs are legal damages within the meaning of the comprehensive general liability insurance policy.¹⁷¹ Second, where courts have found that the government sought relief that constitutes damages, courts have considered whether cleanup costs are the measure of property damage (*i.e.*, damages because of property damage).¹⁷² In order for the CGL policy to provide coverage, courts must find both damages and property damage.¹⁷³

Under the terms of the CGL policy, the insured must establish that the costs the insured seeks to recover are damages within the meaning of the policy and that the insured owes these damages because of property damage.¹⁷⁴ Without a finding of damages, there is no coverage.¹⁷⁵ Similarly, assuming damages includes cleanup costs, if the government has not alleged a claim of property damage, the insurer is not obligated to reimburse the insured under the provisions of the policy.¹⁷⁶ Courts, by concluding that cleanup costs do not constitute damages, however, need not reach the second issue presented; that is, whether the reimbursement of cleanup costs is on account of property damage.¹⁷⁷ Unfortunately, in an effort to resolve these questions, some courts have not considered the issue of covered damages and have settled the dispute based on their interpretation of property damage.¹⁷⁸ The dichotomy in the case law has therefore left both insurers and insureds

171. See *supra* notes 69 and 101.

172. See *supra* note 160 and accompanying text.

173. See Soderstrom, *supra* note 36 and accompanying text.

174. See generally *id.*

175. See, e.g., *Continental Ins. Cos. v. NEPACCO*, 842 F.2d 977, 983 (8th Cir.) (the question of whether cleanup costs constitute damages is dispositive), *cert. denied*, 109 S. Ct. 66 (1988).

176. See, e.g., *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1329 (4th Cir. 1986) (holding that response costs are an economic loss, not damage to tangible property); *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. 958, 961 (D. Idaho 1989) (liability for CERCLA cleanup costs is not based upon a claim of property damage).

177. *NEPACCO*, 842 F.2d at 983.

178. See, e.g., *Chemical Applications Co. v. Home Indem. Co.*, 425 F. Supp. 777 (D. Mass. 1977); *Lansco v. Department of Env'tl. Protection*, 138 N.J. Super. 275, 350 A.2d 520 (Ch. Div. 1975), *aff'd*, 145 N.J. Super. 433, 368 A.2d 363 (App. Div. 1976), *certif. denied*, 73 N.J. 57, 372 A.2d 322 (1977).

uncertain about the potential liability of the insurance companies for expenditures incurred in the cleanup of hazardous waste sites.

A. Cleanup Costs Do Not Constitute Legal Damages

The standard CGL policy defines the obligation of the insurer to pay on behalf of the insured sums incurred in connection with the cleanup of environmental contamination.¹⁷⁹ The policy provides that the insurer must pay "all sums which the insured shall become legally liable to pay as damages because of . . . property damage"¹⁸⁰ The insurer, according to this provision, has not agreed to pay "*all sums* which the insured shall become legally obligated to pay."¹⁸¹ To the contrary, the insurer has agreed to indemnify the insured for all sums the insured is legally required to pay "as damages."¹⁸² The term "damages", therefore, limits the "all sums" provision in the policy; damages provides the key to the obligation of the insurer to pay all sums imposed upon the insured by law on account of property damage.¹⁸³

Because the CGL policy does not define damages, courts are often left with the task of interpreting the meaning of the term. If the word "damages" is deemed ambiguous, courts construe the language against the author of the contract, in this case the insurer, as the applicable state law generally requires.¹⁸⁴ This has led courts that have found an ambiguity in the term to hold that "damages" includes cleanup costs.¹⁸⁵ Where courts find the language unambiguous, however, damages is given its plain and ordinary meaning.¹⁸⁶ While some courts, interpreting the term "damages" according to its plain and ordinary meaning, hold that cleanup costs are covered damages,¹⁸⁷ others recognize that, in the insurance context, the word has a special, tech-

179. See Soderstrom, *supra* note 36 and accompanying text.

180. *Id.*

181. See *NEPACCO*, 842 F.2d at 986; *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1352 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

182. *NEPACCO*, 842 F.2d at 986; *Armco*, 822 F.2d at 1352.

183. See, e.g., *United States Aviex v. Travelers Ins. Co.*, 125 Mich. App. 579, 588, 336 N.W.2d 838, 843 (1983).

184. See, e.g., *New Castle County v. Hartford Accident & Indem. Co.*, 673 F. Supp. 1359, 1365 (D. Del. 1987) (applying Delaware law); *Sharon Steel Corp. v. Aetna Casualty & Sur. Co.*, No. C-87-2366, slip op. at 17-18 (Utah Dist. Ct. Salt Lake County July 20, 1988) (applying Utah law).

185. *New Castle County*, 673 F. Supp. at 1365; *Sharon Steel*, No. C-87-2366, slip op. at 18.

186. See, e.g., *Armco*, 822 F.2d at 1352 (applying Maryland law); *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955) (applying Florida law).

187. See, e.g., *Consolidated Rail Corp. v. Certain Underwriters at Lloyds*, No. 84-2609, slip op. at 9, 12 (E.D. Pa. June 3, 1986), *aff'd*, 853 F.2d 917 (3d Cir. 1988); *Queen City Farms, Inc. v. Aetna Casualty & Sur. Co.*, No. 86-2-06236-0, slip op. at 7 (Wash. Super. Ct. King County Jan. 15, 1988).

nical meaning that precludes coverage for cleanup costs.¹⁸⁸ Thus, whether courts recognize the accepted legal, technical definition of damages has become an issue central to the determination of an insurer's defense or indemnification obligation for CERCLA suits.

The Fourth, Fifth, and Eighth Circuits have given a specific meaning to the word "damages" which precludes coverage for sums payable as a result of compliance with equitable remedies.¹⁸⁹ Recognizing that the term "damages" is plain and unambiguous, the *Armco* and *Hanna* courts accorded a limited, technical meaning to the term.¹⁹⁰ Although conceding that the term is ambiguous outside the insurance context, the Eighth Circuit found that "damages" is unambiguous in the insurance context¹⁹¹ and applied a special definition to the term.¹⁹² While not expressly rejecting the rule of construction that unambiguous terms are accorded a plain meaning, these courts have limited the scope of sums payable as damages.¹⁹³

1. Legal, Technical Definition of Damages

The application of a limited interpretation of damages in the insurance context is, by no means, unfounded. In particular, the obligations of the insured and insurer as set forth in the policy support a limited interpretation of the term. The standard CGL policy expressly limits the insurer's obligation to pay to all sums payable "as damages."¹⁹⁴ As the courts in *Hanna* and *Armco* have recognized, the policy covers only money paid to third parties when those persons have a legal claim for damages against the insured because of property damage.¹⁹⁵ The Eighth Circuit, as well as the Fourth and Fifth Circuits, have determined that, to be covered under the CGL policy, government actions brought against the insured pursuant to CERCLA must constitute a claim for damages.¹⁹⁶ Where the government actions seek equitable relief, there is no coverage under the terms of the policy, since sums payable as a result of compliance with equitable remedies are not sums payable as damages.¹⁹⁷ Thus, the distinction between a claim for damages

188. *Continental Ins. Cos. v. NEPACCO*, 842 F.2d 977, 985 (8th Cir.), *cert. denied*, 109 S. Ct. 66 (1988); *Armco*, 822 F.2d at 1352; *Hanna*, 224 F.2d at 503.

189. *NEPACCO*, 842 F.2d at 986; *Armco* 822 F.2d at 1352; *Hanna*, 224 F.2d at 503. See also *Miller v. Weller*, 288 F.2d 438, 439 (3d Cir. 1961) (stating that "'damages' . . . is a word of art with a rather definite meaning"), *cert. denied*, 368 U.S. 829 (1961).

190. *Armco*, 822 F.2d at 1352; *Hanna*, 224 F.2d at 503.

191. *NEPACCO*, 842 F.2d at 985.

192. *Id.*

193. *Id.*; *Armco*, 822 F.2d at 1352; *Hanna*, 224 F.2d at 503.

194. See *NEPACCO*, 842 F.2d at 985.

195. *Armco*, 822 F.2d at 1352; *Hanna*, 224 F.2d at 503.

196. *NEPACCO*, 842 F.2d at 986-87; *Armco*, 822 F.2d at 1352; *Hanna*, 224 F.2d at 503.

197. *NEPACCO*, 842 F.2d at 986-87; *Armco*, 822 F.2d at 1352; *Hanna*, 224 F.2d at 503.

and a claim for equitable relief is dispositive for a determination of coverage.¹⁹⁸

In a suit for damages, money is awarded to the plaintiff as a substitute for the loss or injury sustained.¹⁹⁹ Damages represents compensatory relief; it is remedial, not preventive.²⁰⁰ The recovery of costs the government paid to clean up pollution, in contrast, represents the specific relief of restitution.²⁰¹ The recovery of cleanup costs will not remedy the injury sustained; rather, a claim for cleanup cost recovery is designed to reimburse the government for restoring the contaminated property to its status quo.²⁰² Accordingly, a claim for reimbursement of cleanup costs is not a claim for damages.²⁰³ It is a claim for equitable relief, not recoverable under the standard CGL policy.²⁰⁴

Some courts have rejected the legal, technical definition of damages, opining that the distinction between a claim for legal damages and a claim for equitable relief is unconvincing.²⁰⁵ These courts have determined that although government claims for recovery of cleanup costs can be characterized as equitable relief, "cleanup costs are essentially compensatory damages for injury to common property."²⁰⁶ Because government claims require the payment of money for acts or omissions of the insured that adversely affect property of third parties, the claims, in the view of these courts, seek dam-

198. *NEPACCO*, 842 F.2d at 983.

199. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2732 (1988) (citing *Maryland Dep't of Human Resources v. Department of Health and Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)); *Hanna*, 224 F.2d at 503; *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 131, 106 A.2d 196, 198 (1954).

200. *Bowen*, 108 S. Ct. at 2732, (citing *Maryland Dep't of Human Resources*, 763 F.2d at 1446); *Hanna*, 224 F.2d at 503; *Desrochers*, 99 N.H. at 131, 106 A.2d at 198.

201. See *Armco*, 822 F.2d at 1352.

202. *Id.* at 1352-53; see also *Desrochers*, 99 N.H. at 131, 106 A.2d at 198.

203. *Armco*, 822 F.2d at 1353; see also *Bowen*, 108 S. Ct. at 2732-33 (suit for declaratory and injunctive relief is an equitable action which seeks reimbursement of funds to which the state is already entitled and which does not seek compensatory relief); *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435, 441 (D. Md. 1977) (in a Securities and Exchange Commission action, restitution and disgorgement constitute equitable relief outside the coverage provided by the policy).

204. See, e.g., *Continental Ins. Cos. v. NEPACCO*, 842 F.2d 977, 987 (8th Cir.), *cert. denied*, 109 S. Ct. 66 (1988); *Armco*, 822 F.2d at 1352; *Hanna*, 224 F.2d at 503.

205. See *supra* note 101.

206. *Waste Management of Carolinas v. Peerless Ins. Co.*, 72 N.C. App. 80, 93, 323 S.E.2d 726, 735 (1984), *rev'd on other grounds*, 315 N.C. 688, 340 S.E.2d 374 (1986); see also *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1168 (W.D. Mich.), *vacated on other grounds*, 683 F. Supp. at 1177 (W.D. Mich. 1988); *Kearsarge Metallurgical Corp. v. Travelers Ins. Co.*, No. E-83-460, slip op. at 7 (N.H. Super. Ct. Jan. 12, 1986); *Solvents Recovery Serv. of New England v. Midland Ins. Co.*, No. L-25610-83, slip op. at 23 (N.J. Super. Ct. Law Div. Nov. 17, 1986), *rev'd on other grounds*, 218 N.J. Super. 49, 526 A.2d 1112 (App. Div. 1987).

ages from the insured, and these damages are recoverable under the terms of the policy.²⁰⁷

However, the mere fact that the government seeks money from the insured does not mean that the government's claim is a claim for damages.²⁰⁸ In *Bowen v. Massachusetts*, the United States Supreme Court recognized the fundamental distinction between legal damages and equitable forms of monetary relief and emphasized: "The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"²⁰⁹ Similarly acknowledging the distinction between legal damages and monetary equitable relief, numerous courts have held that equitable relief, including equitable remedies that seek the payment of money, does not fall within the definition of damages.²¹⁰ Coverage, according to the terms of the CGL policy, does not extend to the insured's liabilities of an equitable nature.²¹¹

Courts have precluded coverage for equitable remedies against the insured even in cases where claims could have been brought for damages.²¹² To equate equitable monetary relief with money damages for the purpose of finding coverage would result in a broadening of the provisions in the standard CGL policy.²¹³ If the term "damages" is accorded a broad meaning, which would include claims for equitable relief as well as claims for legal damages, then the word "damages" "would become mere surplusage."²¹⁴ By requiring the insurer to pay "all sums," some courts have eliminated the limitation that the term "damages" employed²¹⁵ and have effectively altered the obligations of the insurer as set forth in the policy.²¹⁶ Insurance compa-

207. *Chesapeake Utils. Corp. v. American Home Assurance Co.*, 704 F. Supp. 551, 561 (D. Del. 1989); *Thomas Solvent*, 683 F. Supp. at 1168. *Contra Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 435 (D. Md. 1986) (cleanup costs cannot be essentially damages for purposes of interpreting an insurance contract and equitable for purposes of the seventh amendment), *aff'd*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

208. *Bowen v. Massachusetts*, 108 S. Ct. 2722, 2732 (1988).

209. *Id.*

210. *See, e.g., Continental Ins. Cos. v. NEPACCO*, 842 F.2d 977, 987 (8th Cir.), *cert. denied*, 109 S. Ct. 66 (1988); *Armco*, 822 F.2d at 1352; *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955).

211. *NEPACCO*, 842 F.2d at 987; *Armco*, 822 F.2d at 1352; *Hanna*, 224 F.2d at 503.

212. *See, e.g., NEPACCO*, 842 F.2d at 986; *Hanna*, 224 F.2d at 503; *Armco*, 643 F. Supp. 430, 434 (D. Md. 1986), *aff'd*, 822 F.2d 1348 (4th Cir. 1987); *Garden Sanctuary, Inc. v. Insurance Co. of N. Am.*, 292 So. 2d 75, 76-77 (Fla. Dist. Ct. App. 1974); *Ladd Constr. Co. v. Insurance Co. of N. Am.*, 73 Ill. App. 3d 43, 48, 391 N.E.2d 568, 572-73 (1979).

213. *NEPACCO*, 842 F.2d at 986; *Armco*, 822 F.2d at 1352.

214. *NEPACCO*, 842 F.2d at 986; *Armco*, 822 F.2d at 1352.

215. *NEPACCO*, 842 F.2d at 986; *Armco*, 822 F.2d at 1352.

216. *NEPACCO*, 842 F.2d at 986 (quoting *Armco*, 822 F.2d at 1352).

nies are obligated to pay only damages, not all liabilities arising out of proceedings at law.²¹⁷

2. Legislative History of CERCLA

The statutory scheme of CERCLA section 9607(a)(4) provides further support for a limited construction of damages. Under subsection 9607(a)(4)(A), the government can sue for reimbursement of cleanup costs.²¹⁸ Subsection 9607(a)(4)(C), in contrast, permits the government to sue for "damages for injury to, destruction of, or loss of natural resources."²¹⁹ CERCLA, therefore, expressly differentiates between cleanup costs and damages. But, while the government can seek money damages pursuant to subsection 9607(a)(4)(C), it has generally instituted actions for reimbursement of cleanup costs pursuant to CERCLA subsection 9607(a)(4)(A).²²⁰ By seeking recovery of cleanup costs from the insured, the government has indicated its preference for equitable remedies.²²¹ The government suits, as recognized by numerous courts, do not represent a claim for damages as required under the insurance policy.²²²

In *United States Aviex Co. v. Travelers Insurance Co.*, the Court of Appeals for Michigan found that the distinction between the recovery of cleanup costs and the recovery of damages for injury to natural resources was not meaningful.²²³ The court reasoned that the government's decision either to clean up the contamination and later sue for reimbursement, or to sue for damages for harm to natural resources, was an insufficient reason to preclude coverage for cleanup costs.²²⁴ It explained that the costs of restoration were the measure of damage to natural resources.²²⁵ Under this line of reasoning, the costs the government incurred as a result of cleaning up pollution would be the same as the amount of money damages the government

217. *Armco*, 822 F.2d at 1352-53.

218. 42 U.S.C. § 9607(a)(4)(A) (1982 & Supp. V 1987).

219. *Id.* § 9607(a)(4)(C).

220. See generally Crisham & Davis, *CGL Coverage for Hazardous Substances Clean-Up, FOR THE DEFENSE*, Mar. 1988, at 21, 23 (discussing the distinction between governmental cleanup actions seeking equitable relief and claims for money damages).

221. *Armco*, 643 F. Supp. 430, 434 (D. Md. 1986), *aff'd*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

222. See *supra* note 69 and accompanying text.

223. *United States Aviex Co. v. Travelers Ins. Co.*, 125 Mich. App. 579, 590, 336 N.W.2d 838, 843 (1983).

224. *Id.* at 590, 336 N.W.2d at 843.

225. *Id.*

recovered for injury to natural resources.²²⁶ The court, therefore, held that cleanup costs are the equivalent of damages.²²⁷

The reasoning upon which the *Aviex* decision rests is faulty. First, CERCLA creates two separate causes of action under which the government can seek either the recovery of cleanup costs or the recovery of damages.²²⁸ Whether the government chooses the equitable remedy of reimbursement of cleanup costs or seeks an award of damages for injury to natural resources often depends on the cost of liability imputed to the insured for cleanup costs or for damages.²²⁹ The Fourth and Eighth Circuits have consequently recognized that the cost of restoring a hazardous waste site to its original state may exceed an award of damages for the loss.²³⁰ Moreover, there may be circumstances in which the destruction of certain natural resources may exceed the cost of cleaning up a contaminated site.²³¹ The distinction between cleanup cost recovery claims and damages claims, therefore, is not merely fortuitous from the standpoint of the insured.²³²

The legislative history of CERCLA further demonstrates that the remedies available under the statute are not identical and are thus not necessarily the same for insurance purposes.²³³ In a Senate debate on the measure of damages to natural resources, Senator Simpson suggested that the traditional tort rules were applicable for calculating damages.²³⁴ Under these rules, damages to natural resources can be calculated by awarding the difference in value of the resource before and after the injury and by calculating the cost of restoration of the natural resource to its original condition.²³⁵ In *Idaho v. Bunker Hill Co.*, the court stated: "The calculation which provides the least recovery in terms of dollars is the appropriate measure of damages."²³⁶ Cleanup costs, in contrast, are not calculated according to the traditional tort law analysis.

The distinction between the CERCLA remedies is also reflected in the federal regulations promulgating the means for assessing damages for injury

226. *Id.*

227. *Id.*

228. See *supra* note 26 and accompanying text.

229. *Continental Ins. Cos. v. NEPACCO*, 842 F.2d 977, 986-87 (8th Cir.), *cert. denied*, 109 S. Ct. 66 (1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1353 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

230. *NEPACCO*, 842 F.2d at 986-87; *Armco*, 822 F.2d at 1353.

231. *NEPACCO*, 842 F.2d at 987.

232. *Id.* at 986-87; *Armco*, 822 F.2d at 1353.

233. See *supra* note 28 and accompanying text.

234. 126 CONG. REC. 30,986 (1980) (statement of Sen. Simpson).

235. *Id.*

236. *Idaho v. Bunker Hill Co.*, 635 F. Supp. 665, 676 (D. Idaho 1986).

to natural resources.²³⁷ Comments pertaining to the regulations specifically emphasize that damages awarded for injury to natural resources are not equivalent to the response or cleanup costs the government seeks to recover pursuant to CERCLA subsection 9607(a)(4)(A).²³⁸ An assessment of damages is designed to supplement response actions by the government, not to replace them.²³⁹ According to the comments, the principal underlying the theory of natural resource damages is that damages are compensatory.²⁴⁰ The money awarded under this principle, thus, represents a measure of the injury or loss sustained.²⁴¹

Even assuming, under the *Aviex* rationale, that the sums the insured is liable to pay as cleanup costs under CERCLA subsection 9607(a)(4)(A) are the same as the amount of money the insured is required to pay as damages under CERCLA subsection 9607(a)(4)(C), it is the type of relief sought by the government that obligates the insurer to pay.²⁴² The question of coverage for the CERCLA claims against the insured rests on the terms of the policy and the context in which those terms are used.²⁴³ The standard CGL policy does not provide coverage for actions seeking equitable restitution.²⁴⁴ Under the terms of the policy, the insurer has agreed only to pay all sums the insured is legally obligated to pay as damages.²⁴⁵

B. Cleanup Costs Are Not the Measure of Property Damage

The standard CGL policy limits coverage to sums the insured is legally obligated "to pay as damages because of . . . property damage. . . ."²⁴⁶ In addition to establishing that the costs the government seeks to recover from the insured constitute damages, the insured must show that it owes these costs because of property damage.²⁴⁷ The CGL policy does not require a finding of either damages or property damage; it expressly requires the estab-

237. See *supra* note 28 and accompanying text.

238. 51 Fed. Reg. 27674 (1986) (comments accompanying Natural Resource Damage Assessments Final Rule).

239. *Id.*

240. *Id.* at 27680.

241. *Id.*

242. *Continental Ins. Cos. v. NEPACCO*, 842 F.2d 977, 987 (8th Cir.), *cert. denied*, 109 S. Ct. 66 (1988); *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348, 1353 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

243. See *Armco*, 822 F.2d at 1352-53; *Aetna Casualty & Sur. Co. v. Hanna*, 224 F.2d 499, 503 (5th Cir. 1955).

244. See *NEPACCO*, 842 F.2d at 987; *Armco*, 822 F.2d at 1352; *Hanna*, 224 F.2d at 503.

245. *NEPACCO*, 842 F.2d at 986; *Armco*, 822 F.2d at 1351-52; *Hanna*, 224 F.2d at 503.

246. See *supra* note 36 and accompanying text.

247. *Id.*

lishment of damages because of property damage.²⁴⁸ If the sums the government seeks to recover from the insured do not constitute damages, then the policy precludes coverage for those liabilities.²⁴⁹ Assuming, however, that the insured's liabilities pursuant to CERCLA are damages, rather than costs of an equitable nature, the insured must show that the government suits seek relief based on a claim of property damage.²⁵⁰

Some courts have incorrectly held that the CGL policy covers cleanup costs because the insured is legally obligated to pay these sums as damages on account of property damage.²⁵¹ These courts reason that the policy requires the insured to pay not only compensation for property damage, but also all sums the insured must pay as a result of property damage, including CERCLA response costs.²⁵² After determining that the government has alleged a claim of property damage, the courts have concluded that all costs necessitated by this property damage are covered under the policy.²⁵³

Courts adopting this viewpoint have misconstrued the meaning of the policy language. The government claims for recovery of cleanup costs are not claims for property damage.²⁵⁴ In the standard CGL policy, property damage is defined as "physical injury to or destruction of tangible property."²⁵⁵ As noted in *Armco*, claims for recovery of cleanup costs pursuant to CERCLA subsection 9607(a)(4)(A) seek restitution;²⁵⁶ these claims are designed to reimburse the government for costs incurred as a result of restoring prop-

248. *Id.*; see also *Armco*, 643 F. Supp. 430, 433 (D. Md. 1986), *aff'd*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

249. See, e.g., *NEPACCO*, 842 F.2d at 986-87; *Armco*, 822 F.2d at 1352; *Hanna*, 224 F.2d at 503.

250. See Soderstrom, *supra* note 36; *supra* text accompanying note 36.

251. *NEPACCO*, 811 F.2d 1180 (8th Cir. 1987), *reh'g en banc granted*, 815 F.2d 51 (8th Cir. 1987), *aff'd in part, rev'd in part*, 842 F.2d 977 (8th Cir.), *cert. denied*, 109 S. Ct. 66 (1988); *United States Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1168 (W.D. Mich.), *vacated on other grounds*, 683 F. Supp. 1177 (W.D. Mich. 1988); see also *supra* note 160 and accompanying text. See generally Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 969-70 (1988) (discussing the weaknesses of the rationales used to impose liability on insurers).

252. *Thomas Solvent*, 683 F. Supp. at 1168.

253. *Id.*; see also *Powers Chemco, Inc. v. Federal Ins. Co.*, No. 8462/85, slip op. at 4 (N.Y. Super. Ct. Nassau County Apr. 2, 1987), *mod. on other grounds*, 144 A.D.2d 445, 533 N.Y.S.2d 1010 (1988), *appeal granted*, 74 N.Y.2d 602, 541 N.Y.S.2d 985 (1989); *Wagner v. Milwaukee Mut. Ins. Co.*, 145 Wis. 2d 609, 613 n.3, 427 N.W.2d 854, 856 n.3 (Ct. App. 1988).

254. See, e.g., *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1329 (4th Cir. 1986); *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. 958, 961 (D. Idaho 1989).

255. See J. APPLEMAN, *supra* note 37 and accompanying text.

256. *Maryland Casualty Co. v. Armco, Inc.*, 643 F. Supp. 430, 434 (D. Md. 1986), *aff'd*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 703 (1988).

erty to the status quo.²⁵⁷ The government claims for cleanup costs do not arise from property damage, as required by the policy, but are based on the amount of money the government has expended to clean up the contamination.²⁵⁸ It is settled insurance law that strict economic losses do not constitute property damage.²⁵⁹ Under *Mraz*, cleanup costs sought by the government are an economic loss, which falls outside the definition of property damage.²⁶⁰

IV. CONCLUSION

The issue of coverage for government mandated cleanup costs is currently unresolved. Further, it is unlikely that the issue will be resolved in the near future. The effect of the unsettled law is twofold. First, for the insured who contaminates the environment in a jurisdiction that has found no coverage, the enormous financial obligations incurred in cleaning up a site without insurance coverage may result in bankruptcy. Even in jurisdictions where the court has found coverage for cleanup costs, the insured may face liability problems; the insurer may choose not to insure chemical and manufacturing companies in those jurisdictions, requiring those companies to pay even higher premiums to obtain insurance coverage for their operations. Second, where insurance companies choose not to insure some risks based on judicial interpretations of the insurance policy provisions, the insurer will lose valuable profits in premiums.

The public is also affected by the uncertain law in this area. The purpose of the CERCLA and RCRA statutes is to provide a means for Federal and State governments to prevent or control hazardous waste contamination. The statutes are designed to force parties responsible for the contamination to participate in the cleanup efforts. Although Congress has provided the EPA with funds to initiate cleanup efforts, these funds are insufficient in view of the number of hazardous waste sites the government currently recognizes. If the insured is unable to pay for cleanup efforts and if the courts hold that the insurer is not obligated to pay cleanup costs, the taxpayers will be forced to contribute to the funding. Moreover, even if the insurer is held liable for cleanup costs, the insurer will pass the liability costs on to its cus-

257. *Armco*, 822 F.2d at 1352-53; *Desrochers v. New York Casualty Co.*, 99 N.H. 129, 131, 106 A.2d 196, 198 (1954).

258. *Mraz*, 804 F.2d at 1329.

259. See *supra* note 152 and accompanying text.

260. *Mraz*, 804 F.2d at 1329; see also *Aetna Casualty & Sur. Co. v. Gulf Resources & Chem. Corp.*, 709 F. Supp. 958, 961 (D. Idaho 1989); *Protective Nat'l Ins. Co. of Omaha v. Insurance Co. of Pa.*, No. C-514-463, slip op. at 4 (Cal. Super. Ct. Los Angeles County Nov. 24, 1987).

tomers in the form of premiums, thereby affecting other nonliable insurance consumers. In spite of these effects, courts should not permit the principle parties responsible for causing or contributing to environmental contamination to pass the responsibility for cleanup onto the nonliable insurers. Nor should courts rewrite insurance contracts in order to guarantee that the contamination is cleaned up.

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